



Global Governance, Legal Pluralism and the Decentered State: A Labor Law Critique of Codes of Corporate Conduct

Author(s): Adelle Blackett

Source: *Indiana Journal of Global Legal Studies*, Vol. 8, No. 2 (Spring, 2001), pp. 401-447

Published by: Indiana University Press

Stable URL: <http://www.jstor.org/stable/20644777>

Accessed: 15-12-2015 21:48 UTC

Your use of the JSTOR archive indicates your acceptance of the Terms & Conditions of Use, available at <http://www.jstor.org/page/info/about/policies/terms.jsp>

JSTOR is a not-for-profit service that helps scholars, researchers, and students discover, use, and build upon a wide range of content in a trusted digital archive. We use information technology and tools to increase productivity and facilitate new forms of scholarship. For more information about JSTOR, please contact support@jstor.org.



Indiana University Press is collaborating with JSTOR to digitize, preserve and extend access to *Indiana Journal of Global Legal Studies*.

<http://www.jstor.org>

Global Governance, Legal Pluralism and the Decentered State: A Labor Law Critique of Codes of Corporate Conduct

ADELLE BLACKETT*

INTRODUCTION

Nike running shoes, Disney toys, and clothing from the Gap: not so long ago, these highly recognized brand-name goods were to many merely symbols among countless others of consumerism in Western societies. Due to the persistent, high-profile advocacy surrounding corporate self-regulatory initiatives,¹ however, these names are now also stark reminders of the complex, tangled web of multinational enterprise (MNE) activity that draws workers from the developing world into the intricate process of cross-border production.

Through their attention to working conditions as labor rights, labor

* Assistant Professor, Faculty of Law, McGill University. B.A. (Queen's), LL.B. & B.C.L. (McGill), LL.M. (Columbia). This article was submitted in partial fulfillment of the requirements for the degree of Doctor of the Science of Law in the Faculty of Law, Columbia University. Earlier versions of this article have been presented at the Inter/national Intersections Conference, University of British Columbia, Vancouver, May 1998; and the Law and Society Annual Meeting, Aspen, June 1998. This paper has also benefited from the support of the Academic Council on United Nations Systems & the American Society for International Law's Summer Workshop on Globalization and Global Governance, Yale University, New Haven, August 1998. The Author wishes to thank the participants at those events for their engaging questions, as well as Harry Arthurs, Mark Barenberg, Lori Damrosch, Louis Henkin, David Leebron, Linda Reif and Patricia Williams for helpful comments on earlier versions of this article.

1. Typically referred to as "codes of corporate conduct," corporate self-regulatory initiatives have also been called "sourcing guidelines" to the extent that they are implemented by subcontractors. The infrequent but more coordinated industry-wide attempts of MNEs to work alongside consumer groups, human rights non-governmental organizations (NGOs), and trade unions to establish common standards and monitoring mechanisms have been labeled "voluntary monitoring initiatives." Codes of corporate conduct are described broadly by the Organization for Economic Cooperation and Development (OECD) to mean "commitments voluntarily made by companies, associations or other entities, which put forth standards and principles for the conduct of business activities in the marketplace. This definition includes self-obligations and negotiated instruments." See OECD Working Party of the Trade Committee, Codes of Corporate Conduct: An Inventory 5, available at http://www.oecd.org/ech/index_2.htm (last visited Apr. 5, 2001) (compiling information on 233 codes of corporate conduct, 122 of which referred to fair employment and labor rights) [hereinafter OECD Inventory]. This difference in nomenclature underscores the point that the audience for codes of corporate conduct varies, even though with respect to labor standards, all purport to regulate local workers' employment conditions.

advocates seek to wrest protections for workers from corporate actors. At the same time, corporate actors, through their own codes of corporate conduct, publicize to consumers that they are acting voluntarily to ensure that workers in their global production chain enjoy certain rights. In both cases, these initiatives purport to contribute to improved regulation of the workplace.

In this Article, I posit that these initiatives are themselves emerging forms of labor regulation. I contend that as self-regulatory initiatives, they can best be understood through the lens of two key discourses: legal pluralism and economic globalization. These discourses cast light upon the specific nature of labor law, the limits to state regulatory action, and the ability of codes of corporate conduct to adapt to the logic of the new international division of labor.

Part I draws attention to the particular places in which corporate self-regulatory initiatives are concentrated, export processing zones (EPZs), in order to contextualize the inquiry. That inquiry is followed by a brief critical overview of selected contemporary examples of codes, meant to illustrate some of their shortcomings, particularly when applied to the EPZ context. Part II focuses on legal pluralism as it applies to traditional labor regulation, paying attention to the underlying goals of labor law. I hold the new forms of labor regulation up to the light of labor law's goals, and argue that, in their current conception, they fail to meet those goals. In Part III, I further contend that workers' rights advocacy surrounding self-regulatory initiatives simultaneously understands, problematizes, and reinforces dominant conceptions of the globalization process. After assessing some of the very real limits faced by States in the development process, I suggest that the most fruitful contribution of self-regulatory initiatives might be to shine a spotlight on the complex contexts in which MNEs act, including the regulatory contexts. The initiatives also hold the potential to foster deeper cross-border interactions between a range of non-governmental actors. Finally, Part IV turns attention to counter-hegemonic approaches to legal pluralism and economic globalization, which focus on decentering the State nationally and transnationally. In its attention to issues of representation and democratic governance, an approach that decenters the State raises further legitimacy questions of self-regulatory initiatives. However, the approach also provides the starting point for more inclusive, layered forms of labor regulation across different governance levels.

I. SELF-REGULATORY INITIATIVES IN CONTEXT²

A. *The Importance of Place: MNEs in EPZs*

This Section examines the role that place plays in discussions of possible regulatory action concerning the MNE production process. I argue that place is a key element to understanding the significance of the rise in corporate self-regulatory initiatives. I consider the significance of the observation that corporate self-regulatory initiatives tend to apply where certain governmental regulations—notably in the labor field, and often concerning freedom of association—legally do not apply, or systematically are not enforced: in EPZs.³ This observation is a reminder that new forms of regulation⁴ are

2. Several recent, extensive overviews of codes of corporate conduct have been prepared by key international organizations. Two noteworthy examples are the OECD Inventory, *supra* note 1, and International Labour Organization (ILO) Governing Body Party on the Social Dimensions of the Liberalization of International Trade, *Overview of global developments and office activities concerning codes of conduct, social labelling and other private sector initiatives addressing labor issues*, at <http://www.ilo.org/public/english/standards/reln/gb/docs/gb273/sdl-1.htm> (Nov. 1998). See also *Multinational Enterprises and the Social Challenges of the XXIst Century: The ILO Declaration on Fundamental Principles at Work: Public and Private Corporate Codes of Conduct*, in 37 BULL. COMP. LAB. REL. (Roger Blanpain ed., 2000) [hereinafter Blanpain].

3. The ILO and the United Nations Centre on Transnational Corporations (UNCTC) have helpfully defined an EPZ as a “clearly delineated industrial estate, which constitutes a free trade enclave in the customs and trade regime of a country, and where foreign manufacturing firms producing mainly for export benefit from a certain number of fiscal and financial incentives.” See ILO & UNCTC, *Economic and Social Effects of Multinational Enterprises in Export Processing Zones*, at 4 (Geneva: ILO, 1988). Most frequently, these zones provide tax havens to corporations that invest, but other forms of “favorable” re-regulation are prevalent. In some zones, certain labor laws (frequently on freedom of association and the right to bargain collectively) do not apply or are restricted in part (e.g., prohibitions on the right to strike). See ILO, *FREEDOM OF ASSOCIATION AND COLLECTIVE BARGAINING: GENERAL SURVEY 29-30*, 74 (1994). In others, labor law is systematically not enforced. Consider, for example, Tijuana or other maquiladoras along the northern Mexican border, which is the subject of a recent North American Agreement on Labor Cooperation (NAALC) complaint, on the grounds that women are routinely discriminated against based on pregnancy. See SUBMISSION CONCERNING PREGNANCY-BASED DISCRIMINATION IN MEXICO’S MAQUILADORA SECTOR TO THE UNITED STATES NATIONAL ADMINISTRATIVE OFFICE [hereinafter USNAO Discrimination Report], available at www.dol.gov/dol/ilab/public/media/reports/nao/Sub9701.htm; U.S. NATIONAL ADMINISTRATIVE OFFICE ET AL., *PUBLIC REPORT OF REVIEW ON SUBMISSION 9701*, (last visited Apr. 12, 2001), at <http://www.dol.gov/dol/ilab/public/media/reports/nao/pubrep9701.htm>. See also Ana Teresa Romero, *Export Processing Zones in Africa: Implications for Labour*, 2 COMPETITION & CHANGE: J. GLOB. BUS. & POLIT. ECON. 391, 399-405 (1998).

4. See SASKIA SASSEN, *GLOBALIZATION AND ITS DISCONTENTS* 97 (1998) [hereinafter SASSEN, *DISCONTENTS*] (observing that a range of legal innovations and changes are often summarized under the notion of “deregulation,” but contending that “[t]here is a more specific process contained in these changes, one that along with the reconfiguration of territory may signal a more fundamental transformation”). That process is the privatization of transnational legal regimes. Sassen points to international commercial arbitration as one key example of this phenomenon. *Id.* at 98.

emerging in newly created places. Their development is not neutral, nor is it coincidental. Moreover, they are a reminder of globalization's fundamentally asymmetrical nature.

Saskia Sassen has developed a rich analysis of place and placeboundedness. Her analysis focuses on a particular type of place, which she has referred to as "global cities." Through the lens of the global city, Sassen is able to analyze the "underside of globalization," notably in relation to the international financial complex. Her analysis suggests that cities are necessary, even to industries otherwise typically considered to defy place. This insight opens possibilities for future regulatory action.⁵

The analysis in this Section is complementary to that of Sassen's, but considers that the focus on the centers that are "global cities" based principally in nation states of the North is itself only a partial account, notably in relation to MNE production processes. Instead it draws attention to the globalization of regions often considered to be on the periphery⁶ of particular developing countries, through the state construction of EPZs. The periphery is a key element of globalization's asymmetries.

Host countries create EPZs through special re-regulatory laws in order to attract MNEs, whose activities are expected to spur economic development. A tangible contribution of the MNEs, which often boast annual revenues that exceed the GNP of the countries in which they do business,⁷ is the foreign investment that they provide. However, the contribution via taxation is often reduced through fiscal incentives to attract foreign direct investment.⁸ In

5. *Id.* at 202-04.

6. The center-periphery distinction was an important component to the various versions of dependency theory explaining the underdevelopment of newly emergent Third World nation States. A fresh look at dependency theory in analyses of EPZs in economic globalization might yield fruitful outcomes. Consider in particular the work of Samir Amin, who looked at underdevelopment from what can be considered a "global" perspective. See generally Samir Amin, *Accumulation and Development: A Theoretical Model*, 1 REVIEW OF AFRICAN POLITICAL ECONOMY (1972). For a discussion of the different currents of dependency theory, see MAGNUS BLOMSTRÖM & BJÖRN HETTNE, DEVELOPMENT THEORY IN TRANSITION: THE DEPENDENCY DEBATE & BEYOND: THIRD WORLD RESPONSES (1984).

7. See PAUL HIRST & GRAHAME THOMPSON, GLOBALIZATION IN QUESTION: THE INTERNATIONAL ECONOMY AND THE POSSIBILITIES OF GOVERNANCE (1996). See also Robert O'Brien, *Commentary: Labor-Related Codes of Conduct* [hereinafter O'Brien, *Commentary*], in CODES OF CONDUCT FOR PARTNERSHIP IN GOVERNANCE: TEXTS AND COMMENTARIES 160 (Tatsuro Kunugi & Martha Schweitz eds., 1999) [hereinafter PARTNERSHIP IN GOVERNANCE] ("Many developing states are too desperate for investment to demand fair labor practices of MNCs or their local subcontractors. Indeed, many states have created export processing zones to attract such activity.").

8. See ILO Governing Body, Subcommittee on Multinational Enterprises, GB.280/MNE/1/1, 280th Session, Geneva, Mar. 2001 (Part I) at 76, ¶ 124, available at <http://www.ilo.org/public/english/standards/relm/gb/obcs/gb280/mne-1-1.htm> (last visited May 8, 2001) [hereinafter Seventh MNE Declaration Survey] (noting that concessions may include exemptions from taxes on profits for limited periods of time).

addition, MNEs may create backward and forward linkages with local industry,⁹ particularly to the extent that they draw on locally-produced goods in their production processes. There may also be some transfer of technology and expertise. Essentially, however, the contribution flows through the workers. The workers are often young women¹⁰ who have migrated from rural areas to find opportunities in the wage economy. They invariably redistribute their wages¹¹ to family members throughout the country.¹² Ultimately, the contribution to the host company is not the product itself, as the product is meant for export.

Although they travel across national borders to territories within the host country's legal jurisdiction, MNEs generally concentrate their offshore activities in zones that are specifically created in developing or transition economies to facilitate the export of the MNEs' products. Workers in EPZs are thrust into the post-modern system of just-in-time flexible accumulation¹³ as they enter the deterritorialized legal order of the MNEs,¹⁴ living and producing by their norms. Yet, they do so in particular places that may harken back to the Dickensian conditions of nineteenth-century industrialization.¹⁵

Corporate self-regulatory schemes perfectly fit the EPZ model. Logically, an enterprise that establishes itself in an EPZ would seek to avoid entangling

9. The extent of these linkages is contested. See Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Forty-seventh session, Item 8 of the provisional agenda, The Realization of Economic, Social and Cultural Rights: The Relationship between the enjoyment of human rights, in particular, international labor and trade union rights, and the working methods and activities of transnational corporations, E/CN.4/Sub.2/1995/11 (July 24, 1995), at ¶ 49, available at <http://www.unhcr.org/refugees/doc/4a/4a4a4a4a/> (last visited May 31, 2001) [hereinafter ECOSOC]. See also Ruth Buchanan, *Border Crossings: NAFTA, Regulatory Restructuring, and the Politics of Place*, 2 IND. J. GLOBAL LEGAL STUD. 371, 389 (1995) (noting the absence of backwards supply linkages between maquilas and domestic Mexican industry).

10. See generally ANNETTE FUENTES & BARBARA EHRENREICH, *WOMEN IN THE GLOBAL FACTORY* (1992). See also ECOSOC, *supra* note 9, at ¶ 61.

11. Although wages tend to be higher in EPZs than in other areas of the local economy, working conditions may be worse. The long term impact of these conditions should be crucial elements in any analysis of the benefits of EPZs to developing and transition economies.

12. However, the broader social cost of those wages is not always told. See ECOSOC, *supra* note 9, at ¶¶ 61-62. See, e.g., USNAO Discrimination Report, *supra* note 3 (Mexico, concurring).

13. See DAVID HARVEY, *THE CONDITION OF POSTMODERNITY: AN ENQUIRY INTO THE ORIGINS OF CULTURAL CHANGE* 141-72 (1989) (analyzing the shift from Fordism to flexible accumulation and emphasizing the importance of space and time to an understanding of this shift).

14. See Jean-Phillippe Robé, *Multinational Enterprises: The Constitution of a Pluralistic Legal Order* [hereinafter Robé, *Multinational Enterprises*], in *GLOBAL LAW WITHOUT A STATE* 45, 49 (Guenther Teubner ed., 1997) [hereinafter *GLOBAL LAW WITHOUT A STATE*].

15. See HARVEY, *supra* note 13, at 187 (noting how under a system of flexible accumulation, labor practices are particularly eclectic, and the paternalistic labor systems (like sweatshops and informal sector production) that Marx assumed would not survive under advanced capitalism have re-emerged).

itself in a web of local regulation and enforcement. Indeed, the simplified, “deregulated” nature of these zones is meant to attract MNEs. This is not to suggest that all host countries explicitly exclude EPZs from the scope of all national labor legislation, although the tendency certainly has been noted.¹⁶ But the poor enforcement that may prevail throughout the host country is non-existent within EPZs. EPZs are generally operated by EPZ Authorities housed in Ministries of Trade or Foreign Affairs, outside of the purview of comparatively weak Ministries of Labor. Physical access to EPZs is also frequently restricted, prohibiting access not only to trade unions, but also to Labor Ministry officials, including their labor inspectors. In a report to the ILO, a Turkish workers’ organization captured the EPZ experience as “another country in the country.”¹⁷

The cumulative result of MNEs in many EPZs is the *de facto* deregulation of labor relations in these zones. In its place, a new form of legality—corporate self-regulation via the product—is proffered.¹⁸ In this regard, EPZs crystallize the product/production process dichotomy so typical of the new international division of labor, and are intimately linked to the development of transnational consumerism through trade,¹⁹ which is at the core of corporate self-regulatory schemes.

B. A Critical Review of Selected Recent Self-Regulatory Initiatives on Labor Rights

Although codes of corporate conduct have proliferated in recent years, they have a lengthy, cyclical history,²⁰ which suggested early on the limits of

16. See ECOSOC, *supra* note 9, at ¶¶ 64, 65. For a good overview of the impact of labor regulation in EPZs in Central America and the Dominican Republic, see ILO, *LA SITUACION SOCIOLABORAL EN LAS ZONAS FRANCAS Y EMPRESAS MAQUILADORAS DEL ISTMO CENTROAMERICANO Y REPUBLICA DOMINICANA* 21-37 (1996).

17. See Seventh MNE Declaration Survey, *supra* note 8, at 94, ¶ 152.

18. See discussion, *infra* Part II.

19. In fact, the product-process distinction recalls the controversy before the precursor to the World Trade Organization, the General Agreement on Tariffs and Trade (GATT 1994), over the trade in tuna that was not considered dolphin friendly. The first dispute resolution panel distinguished between the product, which it considered to be the proper inquiry for the purposes of the GATT, and the process, which it considered irrelevant. Subsequent dispute resolution bodies under the World Trade Organization’s dispute resolution procedures have moved away from the distinction. See Adelle Blackett, *Whither Social Clause? Human Rights, Trade Theory and Treaty Interpretation*, 31 COLUM. HM. RTS. L. REV. 1, 56-60 (1999).

20. See generally PARTNERSHIP IN GOVERNANCE, *supra* note 7. See also Gijsbert Van Liemt, *Codes of Conduct and International Subcontracting: a ‘private’ road towards ensuring minimum labour standards in export industries*, in Blanpain, *supra* note 2, at 167, 174; Harry W. Arthurs, *Private Ordering and Workers’ Rights in the Global Economy: Corporate Codes of Conduct as a Regime of Labour Market*

self-regulatory devices to secure labor rights absent enabling regulatory, enforcement-based mechanisms.²¹ Heightened contemporary concern over

Regulation, in JOANNE CONAGHAN ET AL., *LABOUR LAW IN AN ERA OF GLOBALISATION* (forthcoming Oxford University Press, 2001) (noting the 17th-19th century origins of employer codes, used at the time by the great global trading companies to regulate employee behavior). Initially considered to be mere due diligence devices, they have also taken the form of attempts by multiple actors to regulate corporate human rights activity transnationally. A widely cited example of the due diligence use of codes of conduct is their operation in connection with the U.S. Sentencing Guidelines. *Id.* at 175. This legislative action induced many corporations to prepare internal codes of conduct. By serving as indicators that corporate action had been taken to address potential problems, those codes then had the effect of reducing sentences. See Van Liemt, in Blanpain, *supra* note 2, at 175. Another example of early codes is the International Code of Marketing of Breastmilk Substitutes, adopted in 1981 by the governing bodies of the World Health Organization and UNICEF. It sought to curb the way that MNEs promoted their product, particularly in the developing world. Some countries adopted the code into national law, and faced with an international boycott of its products, one key MNE, Nestlé, finally adopted the International Code in 1994. See Riva Krut, *Globalization and Civil Society: NGO Influence in International Decision-making*, United Nations Research Institute for Social Development Discussion Paper No. 83, at 44 (Geneva, April 1997).

21. The Sullivan Principles on Investment in South Africa (Sullivan Principles), originally advanced by the late Reverend Leon Sullivan in 1978, provided an early example of the possibilities and limits in relation to labor rights. The Principles were: non-segregation of the races in all eating, comfort and work facilities; equal and fair employment practices for all employees; equal pay for all employees doing equal or comparable work for the same period of time; initiation of and development of training programs that will prepare, in substantial numbers, Blacks and other non-whites for supervisory, administrative, clerical and technical jobs; increasing the number of Blacks and other non-whites in management and supervisory positions; improving the quality of employees' lives outside the work environment in such areas as housing, transportation, schooling, recreation and health facilities. The Principles offered useful insights into the interplay between voluntary initiatives, local context, and state regulatory action, and provided a concrete historical example of the potential interplay between private initiatives and state regulatory action.

The Sullivan Principles included both a voluntary code of conduct and a mandatory annual reporting system, with accompanying grading procedures that were used to classify firms. See Rev. Leon Sullivan, *Agents for Change: The Mobilization of Multinational Companies in South Africa*, 15 L. & POL'Y INT'L BUS. 427 (1983). For a positive assessment of the evolution of the principles, see generally D. Reid Weedon, Jr., *The Evolution of Sullivan Principle Compliance*, 57 BUS. & SOC'Y REV. 56 (1986). The Principles were amplified over the years to prescribe a minimum wage that would be above the living wage, to require recognition of black trade unions, and to encourage South African companies to follow equal rights principles. See Sullivan, *supra*, at 427. However, the reporting system was described as "byzantine," see Jill Murray, *CORPORATE CODES OF CONDUCT AND LABOUR STANDARDS* at § 4.2, available at <http://www.itcilo.it/english/actrav/telearn/global/ilo/GUIDE/JILL.HTM>, and has been roundly criticized for failing to provide adequate information to allow investment decision-making based on compliance with the Sullivan Principles. See Karen Paul, *The Inadequacy of Sullivan Reporting*, 57 BUS. & SOC'Y REV. 61 (1986).

In response, in 1986, the U.S. Congress passed the Comprehensive Anti-Apartheid Act (CAAA), which required the U.S. government and U.S. companies with over twenty-five employees in South Africa to adhere to a code of conduct based on the Sullivan Principles. However, firms that were monitored by the Sullivan Principles were exempt from the CAAA reporting requirements. See Murray, *supra*, at § 4.3. One observer concludes that adherence to the Sullivan Principles was ultimately beneficial to companies investing in South Africa, because it was a cost-effective way to reduce public and political pressures to act ethically. Murray notes that many of those companies actually out-performed their competitors on the Dow Jones Industrial Average with respect to returns on equity between 1977 and 1983. See *id.* The fact that by 1987 the Rev. Sullivan had decided to call for full economic sanctions to end apartheid, see Barbara A. Frey, *The Legal and Ethical Responsibilities of Transnational Corporations in the Protection of*

MNE action, coupled with the recognized limits of international initiatives²² like the OECD Guidelines²³ and ILO MNE Declaration²⁴ to rein in the abuses

International Human Rights, 6 MINN. J. GLOBAL TRADE 153, 174-75 (1997), suggested the limited ability of self-regulatory devices to secure labor rights absent enabling regulatory, enforcement-based measures. Nonetheless, invigorated by the recent expansion in corporate governance initiatives, Rev. Sullivan announced in 1999 the establishment of the "Global Sullivan Principles," affiliated with the United Nations Global Compact. See *Global Sullivan Principles*, at <http://www.globalsullivanprinciples.org> (last visited Apr. 6, 2001). The initiative was devised by Sullivan himself and a group of MNEs from "three continents" with "input and support" from "a broad group of NGOs, intergovernmental organizations, and national governments." See generally *id.* Annual reporting remains a feature of the implementation structure, and an annual meeting of supporting companies and organizations has been added. See *Global Sullivan Principles: Implementation*, at <http://www.globalsullivanprinciples.org/itoolincludes/17429.stm> (last visited Apr. 6, 2001).

22. More concerted efforts to promote social accountability through codes of corporate conduct have taken place through three intergovernmental organizations: the abortive efforts under the United Nations (UN), as well as the two existing, but criticized, measures under the Organization for Economic Cooperation and Development (OECD), and the International Labor Organization (ILO). These mechanisms reflect the international community's ability to achieve consensus on some particularly strong, widely-accepted principles, and to garner useful information. However, these mechanisms fail in their ability to compel compliance in the particular places where MNEs operate.

In the 1970s, the UN embarked on a process to draft a Code of Conduct for Transnational Corporations. See Peter T. Muchlinski, 'Global Bukowina' Examined: Viewing the Multinational Enterprise as a Transnational Law-making Community, in *GLOBAL LAW WITHOUT A STATE*, *supra* note 14, at 79, 95. The initiative formed part of the UN's program for establishing a New International Economic Order. See Declaration on the Establishment of the New International Economic Order, UN Doc. No. A/Res/3201 (s-VI)(1974); Charter on Economic Rights and Duties of States, UN Res. 3281, UN GAOR (1974). The Group of 77, seeking to strengthen its economic sovereignty, garnered support from the former Eastern Bloc States, and placed the passage of an international code to control MNEs on the UN agenda. The proposed code focused on enhancing the ability of host States to regulate MNEs and curb abuses of corporate power, and was initially meant to be a legally binding document. United Nations Draft International Code of Conduct on Transnational Corporations, 23 I.L.M. 626 (1984). The most recent draft was completed in 1990. Development and International Economic Cooperation: Transnational Corporations, UN E/1990/94. This approach, however, collided with the perspective of MNE home states, which instead sought greater freedom of investment and protection of contractual and property rights. See Muchlinski, *supra*, at 95. In an attempt to influence the course of the UN initiative, the major industrialized countries developed their own code under the auspices of the OECD. Despite twelve years of negotiations, issues linked to the enforceable, binding nature of the UN code, notably the role of international law, dispute settlement, and compensation for expropriation, remained unresolved. See *id.* at 96. The code was never adopted. A recent initiative to revive the binding code approach is emerging at the UN, under the Commissioner of Human Rights, although the authors leave open the possibility that it could be voluntary, and enforcement mechanisms remain undeveloped. See UN Economic and Social Council, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Fifty-Second Session, Item 4 of the Provisional Agenda, Sessional Working Group on the Working Methods and Activities of Transnational Corporations, Principles Relating to the Human Rights Conduct of Companies: Working Paper, prepared by David Weissbrodt, May 25, 2000, UN Doc. E/CN.4/Sub.2/2000/WG.2/WP.1, available at <http://www.unhcr.ch/huridocda> (last visited May 8, 2001).

23. The OECD adopted Guidelines for Multinational Enterprises in 1976, setting out voluntary standards covering a broad range of topics beyond the labor domain. OECD, Guidelines for Multinational Enterprises, Annex to the Declaration of June 21, 1976 by Governments of OECD Member Countries International Investment and Multinational Enterprises, available at <http://www.oecd.org/daf/investments/guidelines/decision.html> (last visited June 27, 2000) [hereinafter OECD Guidelines]. The

Guidelines have recently been revised. OECD, OECD Declaration on International Investment and Multinational Enterprises, at <http://www.oecd.org/daf/investment/guidelines/mnetext.htm> (last visited May 8, 2001) [hereinafter OECD Revised Guidelines]. These revisions take into account the fact that "since operations of MNEs extend throughout the world, international co-operation on issues relating to the Declaration should extend to all countries." OECD, OECD Guidelines for Multinational Enterprises, Decision of the Council, at <http://www.oecd.org/daf/investment/guidelines/mnetext.htm> (last visited May 22, 2001) (repealing the Second Revised Decision of the Council of June 1984 [C(84)90], amended June 1991 [C/MIN(91)7/ ANN1]) [hereinafter OECD Decision]. The Guidelines rely heavily on the development by MNEs of self-regulatory initiatives. See OECD, OECD Guidelines for Multinational Enterprises: Review 2000, Commentary, at <http://www.oecd.org/daf/investment/guidelines/mnetext.htm> (last visited May 22, 2001) [hereinafter OECD Commentary]. The Guidelines call on MNEs to "[r]efrain from seeking or accepting exemptions not contemplated in the statutory or regulatory framework" related to a range of issues, including "labour" and "financial incentives." See OECD Revised Guidelines, *supra*, Part II, ¶ 5. In addition, they call on MNEs to "develop and apply effective self-regulatory practices and management systems." *Id.* at Part II, ¶ 7. The statement that the Guidelines "should not ... be considered a substitute for effective law and regulation by governments" is found only in the accompanying Commentary, which is not intended to be a part of the Declaration on International Investment and Multinational Enterprises or of the Council Decision on the Guidelines for Multinational Enterprises, see OECD Commentary, *supra*, at ¶ 11. However, the Commentary specifies that Part IV on Employment and Industrial Relations is now modeled broadly on the ILO's 1998 Declaration of Fundamental Principles and Rights at Work. See OECD Revised Guidelines, *supra*, at Part IV, ¶ 1; ILO, 1998 Declaration of Fundamental Principles and Rights at Work and its Follow-Up, 37 I.L.M. 1233 (adopted June 18, 1998), at <http://www.ilo.org/public/english/standards/decl/declaration/text/index.htm> (last visited May 22, 2001) [hereinafter 1998 Declaration]; OECD Commentary, *supra*, at ¶ 20. Part IV does contain some unique wording, however, such as the right to "engage in constructive negotiations" as opposed to the standard "collective bargaining" formulation. See OECD Revised Guidelines, *supra*, at Part IV, ¶ 1. Other labor standards are also listed, including occupational safety and health and information disclosure. See OECD Revised Guidelines, *supra*, at Part IV, ¶ 4 & Part V (occupational health and safety), Part III & Part IV, ¶ 3 (information disclosure). Enterprises are asked to ensure that workers are able to "consult on matters of mutual concern with representatives of management [that] are authorized to make decisions on those matters." *Id.* at Part IV, at ¶ 8. This is an important inclusion in light of the not infrequent case where decision-makers are based at headquarters in the West, far away from the local workers in the host country. However, the Guidelines ultimately seem only to recommend that enterprises "[o]bserve standards of employment and industrial relations not less favourable than those observed by comparable employers in the host country." *Id.* at Part IV, ¶ 4, at (a).

Outside of national channels for the resolution of disputes, the Guidelines are monitored but not enforced through the loosely tripartite OECD Committee on International Investment and Multinational Enterprises (CIIME). See Murray, *supra* note 21, at § 2.2.1. The Committee on International Investment and Multinational Enterprises can deal with matters raised by the Trade Union Advisory Committee (TUAC) and the Business and Industry Committee (BIAC), which represent their constituencies in this forum, but TUAC and BIAC have only consultative status before the Committee. See *id.* Committee decisions take the form of "clarifications" to the Guidelines, which have been described by Jill Murray as showing "an extremely cautious, even opaque, attitude to interpreting the Declaration, and answering adherence to the principle of national treatment, and the primacy given to national systems of industrial relations and law." See Murray, *supra* note 21, at § 2.2.1. For a thorough discussion of the critiques of the OECD Guidelines, see James Salzman, *Labor Rights, Globalization and Institutions: The Role and Influence of the Organization for Economic Cooperation and Development*, 21 MICH. J. INT'L L. 769, 793-96 (2000). Murray concludes, though, by challenging the OECD's own suggestion that the Guidelines are a respected point of reference for a great majority of MNEs. Specifically, she asserts that the limited references in the 1990s to the OECD Guidelines and the reluctance of multinationals to report on compliance with the code in their annual reports suggest that any "general support from business for the Guidelines reflects the fact that it does little to constrain them in any practical way." See Murray, *supra* note 21, at § 2.2.2. While the

of global capital, has led to a proliferation of private sector workers' rights initiatives, which vary tremendously.²⁵ The differences, notably between earlier individual company codes and more recent coordinated efforts, are important and suggest that significant progress has been made to improve the

procedures have been modified, doubtless in response to such criticism, the changes are quite modest. The revised procedure calls for contact points to be established in all adhering countries to promote the Guidelines, report annually to the CIIME, and assist in the "resolution of issues" linked to implementation. See "Procedural Guidance," OECD Decision, *supra*. How this modified procedure will address the concerns linked to abuses of MNE power, which tend to occur in countries that are not members of the OECD, remains less than clear. Until addressed, the reforms will likely be perceived as highly unsatisfactory. Attention to the places where MNE action may collide with workers' rights calls the need for more focused compliance measures starkly into relief.

24. In 1977, the ILO adopted a Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy. See Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, 17 I.L.M. 422, available at <http://www.ilo.org/public/english/standards/norm/sources/mne.htm> (last visited June 16, 2001) [hereinafter MNE Declaration]. It consists of 58 Articles and refers to the UN resolutions advocating the Establishment of a New International Economic Order and other initiatives by international bodies to act in the field of multinational enterprises and social policy. Recently, it has been modified by the ILO's Governing Body to include the ILO Declaration on Fundamental Principles and Rights at Work. ILO Governing Body, Follow-up and Promotion, March 2000, Sub-Committee on Multinational Enterprises, GB.277/MNE/1 (2000), available at <http://www.ilo.org/public/english/standards/relm/gb277/pdf/mne-3.pdf> (last visited May 8, 2001). It captures a broad range of economic and labor policies, including employment (employment promotion, equality of opportunity and treatment, security of employment), training, conditions of work and life (wages, benefits and conditions of work, safety and health), and industrial relations (freedom of association and the right to organize, collective bargaining, consultation, examination of grievances, and settlement of industrial disputes). It then seeks to apply them carefully in the particular context of local workplaces under the control of MNEs. It is worth noting that UNCTAD has praised the MNE Declaration as a "key reference standard" for international investment agreements that seek to address labor matters. See UNCTAD, WORLD INVESTMENT REPORT 1996: INVESTMENT, TRADE & INTERNATIONAL POLICY ARRANGEMENTS 187 (1996). This is most apparent in the provisions on industrial relations. Article 52 refers to "bona fide negotiations" and seeks specifically to preclude the use by an MNE of threats to transfer its operations to unfairly influence negotiations or to hinder the exercise of the right to organize. See MNE Declaration, *supra*, at 429. Article 57 sets out grievance principles to ensure that workers have a core of basic procedural rights, which are "particularly important whenever the multinational enterprises operate in countries which do not abide by the principles of ILO Conventions pertaining to freedom of association, to the right to organise and bargain collectively and to forced labor." *Id.* The MNE Declaration is monitored through a quadrennial survey to the ILO's governing body on questionnaire responses from governments, employers, and worker's representatives. See most recently the Seventh MNE Declaration Survey, *supra* note 8.

Some observers have concluded that the MNE Declaration is not a tool to remedy violations by MNEs of the Declaration's principles. See Murray, *supra* note 21, at § 2.3.1. Most significantly, even the ILO's working party, which wrote the Seventh MNE Declaration Survey, "quer[ie]d the effectiveness of the application of the MNE Declaration in EPZs/SEZs and recommend[ed] exploration of further means for promotion of its principles in such settings." See Seventh MNE Declaration Survey, *supra* note 8, at 112, ¶ 203. Indeed, certain member States have called for reforms, including the establishment of a functioning observatory and investigatory body that signals abuses by MNEs. See *id.* at 101, ¶ 166 (Belgian governmental proposal).

25. A particularly helpful recent resource on codes of corporate conduct and research on these initiatives is the ILO's Business and Social Initiatives Database (BASI), at <http://oracle02.ilo.org:6060/upi/vpisearch.first> (last visited May 8, 2001).

effectiveness of private initiatives. Despite these ameliorations, however, the fundamental tensions between codes and the local regulatory environment remain strong.

1. *Individual Company Codes*

In their initial, and still common current form, individual company codes of corporate conduct remain short documents reminiscent of due diligence instruments, issued by head offices of MNEs and containing vague assertions that local labor standards will be respected.²⁶ Unlike the intergovernmental models, these codes tend not to refer to freedom of association and the right to bargain collectively, even as it may be recognized locally.²⁷ Indeed, they do not generally refer to the ILO Declaration on Fundamental Principles and Rights at Work,²⁸ or to the specific fundamental labor standards that embody those principles and rights:²⁹ Conventions Nos. 87 and 98 on freedom of association and the right to bargain collectively,³⁰ Nos. 29 and 105 on forced labor,³¹ Nos. 100 and 111 on non-discrimination and equality of treatment,³² and Nos. 138 and 182 on child labor.³³ Basic issues, like translation of

26. See OECD Inventory, *supra* note 1, at 16. The OECD Inventory underlines the particular difficulty attached to identifying whether codes are in operation or have been modified, as many code texts do not specify a date of entry into force. *Id.* at 8. See also Van Liemt, in Blanpain, *supra* note 2, at 181-83.

27. Chris Engels points out some rather striking examples of this important omission. See Chris Engels, *Codes of Conduct: Freedom of association and the right to bargain collectively*, in Blanpain, *supra* note 2, at 207, 220-31.

28. See 1998 Declaration, *supra* note 23.

29. For an overview of these principles and rights at work, see Blackett, *supra* note 19, at 13-34.

30. See Convention Concerning Freedom of Association and Protection of the Right to Organize, adopted July 9, 1948, 68 U.N.T.S. 17 (No. 87), available at <http://ilolex.ilo.ch:1567/scripts/convde.pl?query=C87&query0=C87&submit=Display> (last visited June 16, 2001); Convention Concerning Application of Principles of Right to Organize and to Bargain Collectively, adopted July 1, 1949, 96 U.N.T.S. 257 (No. 98), available at <http://ilolex.ilo.ch:1567/scripts/convde.pl?query=C98&query0=C98&submit=Display> (last visited June 16, 2001).

31. See Convention Concerning Forced or Compulsory Labour, adopted June 28, 1930, 39 U.N.T.S. 55 (No. 29), available at <http://ilolex.ilo.ch:1567/scripts/convde.pl?query=C29&query0=C29&submit=Display> (last visited June 16, 2001); Convention Concerning Abolition of Forced Labour, adopted June 25, 1957, 320 U.N.T.S. 291 (No. 105), available at <http://ilolex.ilo.ch:1567/scripts/convde.pl?query=C105&query0=C105&submit=Display> (last visited June 16, 2001).

32. See Convention Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, adopted June 29, 1951, 165 U.N.T.S. 303 (No. 100), available at <http://ilolex.ilo.ch:1567/scripts/convde.pl?query=C100&query0=C100&submit=Display> (last visited June 16, 2001); Convention Concerning Discrimination in Respect of Employment and Occupation, adopted June 25, 1958, 362 U.N.T.S. 31 (No. 111), available at <http://ilolex.ilo.ch:1567/scripts/convde.pl?query=C111&query0=C111&submit=Display> (last visited June 16, 2001).

33. See The Minimum Age Convention, adopted June 26, 1973, 1015 U.N.T.S. 297 (No. 138), available at <http://ilolex.ilo.ch:1567/scripts/convde.pl?query=C138&query0=C138&submit=Display> (last

documents or the institution of clear time horizons for particular actions, are often overlooked.³⁴ Few such codes contain dispute resolution mechanisms or provisions for "independent monitoring."³⁵ According to a particularly comprehensive study, none provides for host government involvement.³⁶

Codes of corporate conduct apply generally to the workers in companies with transnational involvement; few differentiate between individual countries or contemplate those countries' specificities.³⁷ Tellingly, the differences between individual codes of corporate conduct seem more accurately to mirror the sensibilities of the various national audiences of consumers to whom the products are targeted, even at the risk that different MNEs that subcontract to the same local firm will seek to regulate the workers' conditions of employment differently. The regulatory link is the product, rather than the worker or the workplace.

visited June 16, 2001); The Convention Concerning Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, adopted June 17, 1999, 38 I.L.M. 1207 (No. 182), available at <http://iloex.ilo.ch:1567/scripts/convde.pl?query=C182&query0=C182&submit=Display> (last visited June 16, 2001). According to the OECD Inventory, only 18% of the codes surveyed referred to one or more international standards. Those international standards most often cited were ILO Conventions and UN Declarations, although the OECD Guidelines for Multinational Enterprises was used as a reference in one code. OECD Inventory, *supra* note 1, at 16. See also Van Liemt, in Blanpain, *supra* note 2, at 181.

34. See Ans Kolk, *International Codes of Conduct and Corporate Social Responsibility: Can Transnational Corporations Regulate Themselves?*, 8 TRANSNAT'L CORP. 143, 163 (1999) (noting that only fourteen percent of the 132 codes contain a clear time horizon).

35. [A] significant number of company and business association codes included in the inventory do not touch on the subject of monitoring at all. Where company codes have relevant provisions, almost all state that in-house staff will oversee implementation of and compliance with the code's standards—both by the company that issues the code and by its suppliers and other business partners. In other words, companies tend to prefer internal procedures or remain silent on this issue.

OECD Inventory, *supra* note 1, at 17. Consider, though, that on April 20, 1998, suit was brought before the Superior Court of California, claiming that Nike has violated the California Unfair Business Practices Act, CAL. BUS. & PROF. CODE § 17200 (Deering 2001), by making misrepresentations by the use of false statements and material omissions about a range of working conditions to maintain and/or increase its sales. *Kasky v. Nike, Inc.*, 93 Cal. Rptr. 2d 854, 857 (Cal. Ct. App.), review granted and superceded by 2 P.3d 1065 (Cal. 2000).

36. See OECD Inventory, *supra* note 1, at 19, para. 57.

37. [A] large majority of the codes apply to the direct employees of the company or companies concerned. The survey also finds that when companies set standards for the direct employees, these usually apply to the global operations of the company. In only one instance did a company differentiate between countries, having developed two different codes, one applicable to its activities carried out in the United States and one for its operations in the rest of the world. . . . A significant number of codes extend to the employees of contractors [and sub-contractors].

Id. at 15.

2. Coordinated Initiatives

Despite these daunting initial difficulties with individual codes, coalitions of civil society and business groups—with or without some governmental input—have attempted to craft more coordinated mechanisms to respond sensibly to the challenges of regulating labor standards across borders and across many different MNE contracting agreements.³⁸ These initiatives suggest that there has been serious development over time in the analysis of how to address the complexities of labor regulation in workplaces across borders.³⁹ However, none escapes the paradox of regulating via the product

38. A prominent contemporary example of codes of corporate conduct in their more coordinated form originated with the White House Task Force, known initially by its sectoral focus as the Apparel Industry Partnership (AIP), which has led to the formation of the Fair Labor Association (FLA). The AIP was formed in 1996 after a nudge from U.S. President Bill Clinton and Secretary of Labor Robert Reich in the wake of the widespread public concern over conditions in the overseas factories of popular U.S. brand name apparel manufacturers. An initial presidential photo-opportunity meeting of industry and labor representatives and prominent NGOs led to a regular series of working meetings to craft industry standards on issues such as forced labor, child labor, harassment, and freedom of association. It sought to build in an industry-wide consensus not only on certain standards, but also on the monitoring of those standards. After two years of meetings between industry representatives, U.S. trade unions and NGOs, during which time some companies defected, an agreement was reached. *Karen Kane is 2nd Company to Quit Anti-Sweatshop Unit*, WOMEN'S WEAR DAILY, June 20, 1997, at 14 (noting that the Warnaco Group decided to leave in April 1997, and that Karen Kane Inc. "took issue with the panel's approach for keeping tabs on the myriad factories and contractors worldwide that produce garments and shoes for the U.S. market"). The Agreement included the FLA, which would implement and monitor the code of conduct. For a brief discussion of the AIP/FLA, see Justine Nolan & Michael Posner, *International Standards to Promote Labor Rights: The Role of the United States Government*, 2000 COLUM. BUS. L. REV. 529, 539-541 (2000). However, the major trade unions, notably UNITE, and several key NGOs, including the Interfaith Center on Corporate Responsibility, disassociated themselves from the agreement, dealing a severe blow to the legitimacy of the final text. Steven Greenhouse, *Two More Unions Reject Agreement for Curtailing Sweatshops*, N.Y. TIMES, Nov. 6, 1998, at A15. One example of the legitimacy challenge came in the fall of 1998. Suppliers of university apparel proposed codes of conduct that mirrored the AIP code of conduct. However, students protested on the grounds that the AIP did not contain provisions for a living wage and did not have adequate provision to enable the codes to be monitored on site. See O'Brien, *Commentary*, *supra* note 7, at 161. It has been observed that "the result is a code short of broad support and of questionable utility." *Id.* at 162.

The reasons for the fallout predictably surrounded three key issues: the absence of living wage provisions, the failure to encourage companies to support the right to organize and bargain collectively, and the absence of truly independent monitoring. See *id.* at 161. The rift between the trade unions who refused to support the final code and the NGOs that remained in the partnership underscored key differences between those groups, and brought into relief the importance of considering questions of agency, identity and democratic participation in the framework of corporate self-regulatory initiatives that affect the workplace. See discussion *infra*, Part IV.

39. A particularly compelling recent example of this progress is the Workers Rights Consortium (WRC). This robust initiative was launched in 2000 by the United Students Against Sweatshops in consultation with workers and human rights groups, with the aim to provide an alternative to company-controlled monitoring. Targeted to university-licensed procurements, it has already garnered the affiliation of 76 colleges and universities; these schools fund the WRC via either a percentage of licensing revenues or annual dues. See http://www.workersrights.org/member_schools.htm. (last visited May 31, 2001);

Bylaws of the Workers Rights Consortium, Annex I, Key WRC Principles, *available at* <http://www.workersrights.org>. (last visited May 31, 2001). The WRC seems largely consistent with the theoretical insights of Charles Sabel, Dara O'Rourke and Archon Fung in *Ratcheting Labor Standards: Regulation for Continuous Improvement in the Global Workplace*, John F. Kennedy School of Government, Harvard University Faculty Research Working Papers Series, KSG Working Paper No. 00-010 & Columbia Law School, The Center for Law and Economic Studies, Working Paper No. 185, *available at* http://papers.ssrn.com/paper.taf?abstract_id=253833 (last visited May 31, 2001).

The WRC's proposed Code of Conduct tackles tricky but important questions like the meaning of a living wage; surprisingly, though, in some areas where internationally recognized ILO standards exist, the WRC appears only loosely to be based on them and does not appear to address the worst forms of child labor. In one case, it refers specifically to compliance with U.S. law on occupational safety and health. *See* Workers Rights Consortium Code of Conduct, §§ 4 (child labor) and 6 (health and safety) respectively, *available at* <http://www.workersrights.org> (last visited May 31, 2001).

The WRC is wisely tailored to avoid several common pitfalls of other code initiatives. First, it avoids certifying that companies are in compliance; rather, it uses the vehicle of the licensing agreement between universities and suppliers to hold the licensee accountable for violations of the relevant code of conduct. Although the WRC initiative relies on the spotlight effect to promote change of abusive conditions, it requires the licensee to assume an obligation to use its leverage to correct problems at the problematic worksite, rather than merely exercising its exit option, a thorough verification system. That verification system relies on several mechanisms including public disclosure, spot investigatory capacity, and the use of the licensing agreement as leverage. Attention has also been given to the characteristics and qualifications of the evaluators, drawing in particular on university resources. This enables it to maintain its credibility and essentially to hold its affiliates, the universities, to act responsibly in the face of verified violations. Second, it has strong academic representation; indeed, the tight link to universities gives it a built-in supportive constituency and a level of legitimacy that could not as easily be garnered in other sectors. It has also garnered greater participation through its advisory council than many code initiatives from trade unions in producing countries. *See* <http://www.workersrights.org/governance.html> (last visited May 31, 2001). Third, its verification procedures are considerably more robust than most, thereby avoiding some of the pitfalls that at the outset undermine verification efforts. Continual reevaluation, notably of verification procedures, is also built into the initiative. *See* WRC Investigative Protocols, *available at* <http://www.workersrights.org>. (last visited May 31, 2001). For these important reasons, the WRC is a clear example of solid progress in the development of workers rights advocacy initiatives, reminiscent of some of the more robust European coordinated initiatives, like the Clean Clothes Campaign. *See* <http://www.cleanclothes.org> (last visited May 31, 2001).

However, the WRC initiative, because it is based on the management-ordering code of corporate conduct model, is ultimately unable to avoid some of the critiques that are central to this analysis, and discussed in greater detail *infra* at Parts II and III. First, the WRC initiative does not grapple with the potential role of the State in regulating labor conditions, particularly in places like EPZs. Indeed, on the issue of freedom of association and collective bargaining, the WRC's code of conduct mentions the State only to clarify that licensees "shall not cooperate with governmental agencies and other organizations that use the power of the State to prevent workers from organizing a union of their choice." *See* Workers Rights Consortium Code of Conduct, § 9, *available at* <http://www.workersrights.org> (last visited May 31, 2001). No attention is given to the potential facilitative role that governments can be enabled to play, in order to promote freedom of association and the right to bargain collectively. The initiative focuses instead on accentuating unannounced spot investigations in countries and regions where workers rights are suppressed, with the expectation that MNEs will seek to change their labor and sourcing practices comprehensively to ensure compliance.

Second, although the WRC has a model code, each individual affiliated university retains the ability to establish its own code; this, coupled with the plethora of other existing codes of corporate conduct for non-WRC affiliated purchasers, can lead to individual plants producing according to different standards, depending on where each product is destined. It is not clear how the goal of promoting comprehensive MNE management codes could be realized, and even whether it would be desirable, given the variations that

to ensure that labor is not commodified.

It is useful to pause to consider a rather thorough attempt to self-regulate, which poignantly illustrates this paradox: Social Accountability International's (SAI)⁴⁰ SA8000 code. The 1997 initiative is modeled on a widely used set of business certification standards established through the International Organization for Standardization (ISO);⁴¹ particularly, on the quality control standard ISO 9000. The SA8000 is one of the most rigorous voluntary codes of conduct yet crafted. The SA8000 relies fairly heavily in some areas on the Conventions of the ILO and other key human rights instruments. Its standards cover child labor, forced labor, health and safety, compensation, working hours, discrimination, discipline, freedom of association and the right to bargain collectively, and "management systems."⁴² Yet the reliance on international standards raises its own concerns. For example, the code contemplates that in the absence of state facilitation of matters like the freedom of association and the right to bargain collectively, it is the company that should essentially prevent anti-union discrimination.⁴³

Yet particularly on freedom of association as it applies in local EPZs through codes of corporate conduct, the SA-8000 and other codes of corporate conduct appear to be inelegantly grafted onto a local context with little consideration given to how freedom of association could be meaningfully promoted. It is difficult to imagine how employers could "recognize and respect the right of employees to freedom of association and collective bargaining"⁴⁴ in EPZs where enabling state regulatory frameworks of collective bargaining do not apply or are inoperative. Absent a general industrial relations system that underpins the freedom of association and ensures the effective right to bargain collectively, the panoply of principles,

ultimately arise in light of the particulars of different places of production. Indeed, central to the critique of this paper is that the very promotion of a comprehensive MNE management code ultimately reinforces the power of corporations to extend their unmediated power into these new workplace contexts.

40. Until the summer of 2000, this initiative was known as the Council on Economic Priorities Accreditation Agency (CEPAA). See <http://www.cepaa.org/introduction/htm>. (last visited May 31, 2001). The advisory board for this initiative is more international than was the Apparel Industry Partnership, although the input remains overwhelmingly from industrialized countries. See http://www.cepaa.org/advisory_board.htm. (last visited May 31, 2001).

41. It is noteworthy that ISO's approach to standard setting, notably in the environmental domain, has come under sharp criticism for its failure to include NGOs and its tardy, limited inclusion of developing countries. See Krut, *supra* note 20, at 33-34.

42. See <http://www.cepaa.org/sa8000.htm>. (last visited May 31, 2001) [hereinafter SA8000].

43. *Id.* at § 4.

44. Apparel Industry Partnership, Report of Apparel Industry Partnership on Workplace Code of Conduct, at <http://www.dol.gov/dol/esa/ublic/nosweat/partnership/report.htm> (last visited May 14, 2001). See also discussion *supra*, note 38 and accompanying text.

processes and enforcement mechanisms either disappear or are partially recreated through piecemeal private measures.⁴⁵ Fundamentally, the self-regulatory measures leave unanswered the question of who will mediate and regulate relations between MNEs and workers. Business self-regulation allows footloose capital to perch high above local regulation and enforcement channels, without disrupting trade or investment flows,⁴⁶ and with only the occasional concession that “independent” monitors may become the arbiters of whether labor-related codes of conduct are being enforced.

The management systems auditing dimension is touted as a cornerstone of the SA8000 system,⁴⁷ but for an observer assessing it from an industrial relations perspective, the gulf between the “management systems” framework and the “industrial relations” framework is stark. The SA8000 places a premium on CEPAA’s ability to certify and accredit firms (certification bodies) to become external auditors. Those external auditors certify manufacturing facilities for conformance to SA8000, following established criteria for accreditation.⁴⁸ Moreover, CEPAA has an ongoing process to

45. Strikingly, the SA8000 contemplates that “[t]he company shall, in those situations in which the right of freedom of association and collective bargaining are restricted under law, facilitate parallel means of independent and free association and bargaining for all personnel.” SA8000, *supra* note 42, at § 4.2. Similarly, it is significant that in their proposal of a regulatory strategy that relies on competition between firms and consumer pressure to ratchet up labor standards, Sabel, O’Rourke, and Fung are conspicuously silent on the freedom of association and collective bargaining rights, although they concede that “organized workplaces might prove to be the most capable social monitors and agents of continuous improvement.” See Sabel *et al*, *supra* note 39, at 35.

46. See OECD Inventory, *supra* note 1, at 4 (noting that issues addressed through codes of corporate conduct rely mainly on non-governmental bodies in ways that seek to entail little direct impact on trade or investment flows).

47. See CEPAA, *Comments and Corrections Regarding the SA8000 System: A Response to the June 1999 Laric Report on SA8000*, at <http://www.cepaa.org/Documents/ResponsetoLARIC.doc>.

48. External monitors must:

- Pass the SA8000 lead auditor training course;
- Be registered with a recognized international accreditation body, e.g., Rab or IRCA;
- Be trained on audits by their employer and approved prior to advancing to a “lead” position, which is authorized to conduct the audit;
- Have the appropriate language skills;
- Have a subject matter expert available determined by the nature of the industry;
- Be knowledgeable of local customs and practices (preferably living and working in the area);
- Research local laws and health, safety regulations before performing the audit(s);
- Communicate with local NGOs and trade unions to obtain “real” information about the facility prior to the audit to sensitize them to possibly intimidating conditions;
- And, above all, they are subject to periodic review by the agency to assure that the auditor has the necessary skills and that the job was done correctly.

monitor the certification bodies.⁴⁹ Not only do accredited certification bodies prepare a report; they also issue a statement of “conformance” or “non-conformance,” with a view to certification.⁵⁰ An important dimension of the standard is that certification is not issued to MNEs as such, but to individual plants.⁵¹ Consequently, compliance guarantees are locally based.

SAI’s model reflects a classic management systems framework. Its focus is not unlike that adopted to ensure that there is a level of quality control of a “product” in the production process. In other words, standards are put in place to ensure that production runs smoothly and efficiently, from a management perspective. SAI also seems prepared to be reflective about its process in the making, and has embarked on a consultative review in 2000.⁵² The problematic aspect of this framework is that in the labor relations context, the underlying considerations justifying labor regulation are outside of—and to a limited extent in conflict with—the management systems framework. As will be discussed in Parts II and III, from a labor relations perspective, the adaptation of an approach that has been applied to “product” justifiably elicits skepticism when it is applied to working “people” in their relationship with management in the production “process” in particular places, like EPZs.

Id.

49. CEPAA has summarized the criteria as follows:

- Adheres to ISO/IEC Guide 62.
- Obtains and maintains information about working conditions from regional interested parties, NGOs, and workers and how such information is incorporated in the plans for initial audits, surveillance, and re-certification audits.
- Determines the sufficient wage level, per SA8000, 8.1, and the Guidance thereto.
- Ascertains and records, prior to accepting a client, the languages spoken by personnel at the facility, and the proportion speaking each.
- Maintains client files documenting the above information and uses the above-mentioned information in the audit process.
- Ensures audit personnel are trained in the components and application of SA8000 procedures for selecting a qualified team of auditors.
- Obtains factual information in a manner sensitive to local cultural norms, and ensures that any audit team can so conduct employee interviews and protect the confidentiality of workers who are interviewed.
- Ensures auditor possession of appropriate local language and interview skills and/or that any subcontractor, auditor or translator engaged in the audit is impartial, including that he or she is not an employee or recent ex employee of the auditee.

Id. See also http://www.cepaa.org/accreditation_criteria.htm. (last visited May 31, 2001).

50. *Id.*

51. *Id.* See also SA800 Certified Facilities (as of April 2001), at <http://www.cepaa.org/certification.html>. (last visited May 31, 2001).

52. See http://www.cepaa.org/sa8000_review.htm. (last visited May 31, 2001).

II. LEGAL PLURALISM AND THE SPECIFICITY OF LABOR REGULATION

A. *The Specificity of Labor Regulation*

Corporate self-regulatory initiatives reflect the perception that in an increasingly interdependent economy, it is desirable (for protectionist or moral reasons) to control the conditions under which imported goods are produced. At least from the moral perspective, workers' rights advocacy strengthens the increasingly prevalent claim that it would be better not to have production at all than to produce under conditions that lead to the systematic violation of a limited set of fundamental human rights. This approach has translated into attempts to establish effective labor conditions wherever there is some link between the worker and the final consumer product. However, by focusing on the "product," codes of corporate conduct tend to treat labor conditions in a manner that parallels other production processes, like those relating to the environment.⁵³ Codes of corporate conduct are viewed simply on an administrative level, as regulatory links that connect workplace conditions to the global production chain.

In fact, however, labor is different. At a basic level, this is because labor is about people. Through the "productive" process, people enter the market system in their capacity as a factor of production. However, their subordinated participation is expected to be other than that of a commodity merely bought and sold in relation to supply and demand. Labor law therefore mediates their access, infusing it with the dignity that the market alone cannot provide. To the extent, then, that labor law is where the role of market ordering and public policy is traditionally mediated,⁵⁴ the hard question for labor law, in light of changes in production and trade patterns, becomes the relative role of labor regulation in a transnational context.

The dual purpose of labor law is to provide worker protection and worker agency through democratic participation.⁵⁵ Under traditional industrial

53. This is not to suggest, however, that representation is unimportant in other issue areas; rather, the argument here rests on the specificity of the labor relationship and why it warrants a particular form of representation.

54. See Brian A. Langille, *General Reflections on the Relationship of Trade and Labor (Or: Fair Trade is Free Trade's Destiny)* [hereinafter Langille, *General Reflections*], in FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE 231, 243 (Jagdish N. Bhagwati & Robert E. Hudec eds., 1996) [hereinafter FAIR TRADE AND HARMONIZATION].

55. See Constitution of the International Labour Organization, June 28, 1919, 225 Consol. T.S. 378-39, available at <http://www.ilo.org/public/english/about/iloconst.htm> (last visited May 31, 2001). See also

relations theory, these purposes are accomplished by a state regulatory framework that allows groups with divergent interests to regulate relationships between themselves, while simultaneously establishing a floor of protective conditions. Through collective action, independent workers' representatives negotiate the relationship between workers and management. In this manner, labor regulation establishes the channels that give workers "voice" through which they can participate democratically in workplace decisions. Workers and management can then identify and focus on convergences of interest, while effectively negotiating, mediating, and where necessary arbitrating differences. Yet the philosophical basis of the right to bargain collectively is found not in trade union membership, but rather in workers' subordination to management through the employment relationship.⁵⁶ For the collective bargaining relationship to retain its validity, it must therefore respect certain basic balances between management and worker rights,⁵⁷ often delineated in protective legislation.⁵⁸

Corporate self-regulatory initiatives change the delivery of both key labor regulatory principles. They are typically characterized as securing the former purpose, worker protection. They do so by articulating protective standards⁵⁹ that MNEs should ensure are implemented by enterprises directly or indirectly involved in the production process, anywhere on the globe. However, they do so while increasing the scope of management power, over-reaching or supplanting state protective action required to mediate the effects of disproportionate bargaining power (even in collective relations), and to prevent unacceptable bargains that might be arrived at through "voluntary" collective bargaining.⁶⁰ Furthermore, their ability to protect workers' rights through independent monitoring is severely contested.⁶¹

PAUL WEILER, *GOVERNING THE WORKPLACE* 226 (1990).

56. See Alain Supiot, *Déréglementation des relations de travail et autoréglementation de l'entreprise*, 3 DROIT SOCIAL 195, 204 (Mar. 1989).

57. See *id.*

58. David Beatty, *Ideology, Politics and Unionism*, in *STUDIES IN LABOUR LAW* 299, 321 (Kenneth P. Swan & Katherine E. Swinton eds., 1983).

59. See generally Frey, *supra* note 21.

60. For a thorough discussion of the limits of traditional collective bargaining law and the need for a protective role of the state in the law of employment, broadly understood, see Beatty, *supra* note 58.

61. Van Liemt's assessment is as follows:

Certain working conditions are more easily verified than others are. Adequate lighting, the wear of protective gear, access to emergency exits, and cleanliness are all elements that can be checked without too many problems, even by people without specialised training. To establish the age of a child worker or the wage that is being paid is more complex. To know whether workers are forced to work overtime, suffer from sexual harassment or are physically abused requires a basis of trust between the

As to the latter democratic participation role, there is a certain irony in the fact that the move to view labor standards as human rights⁶² through universally-applied codes of corporate conduct has turned attention away from some of the key insights of industrial relations that underpin the pluralism in regulatory and enforcement powers. By diverting attention to management monitoring systems, and away from classic voice mechanisms through labor-management dispute settlement machinery, self-regulatory initiatives run the risk of supplanting rather than buttressing democratic participation in the workplace.

B. Pluralism in Traditional Industrial Relations Law and Tensions of the New Paradigm

The preceding critique could be read as suggesting that state mechanisms are necessarily preferable to the regulation of labor relations over potentially more efficient and effective self-regulatory measures undertaken by the freely chosen, independent representatives of both workers and employers. Yet such a reading would miss the point that the opposition between state and private action is hardly that stark in labor relations law and practice.⁶³

Pluralism is an integral part of the traditional industrial relations paradigm.⁶⁴ As historian Jean-Marie Fecteau explains, freedom of association became the medium through which different civil society groups, including workers' organizations, were permitted to self-regulate, but within the context of a liberal legal system.⁶⁵ The key liberal ideal of voluntarism was the

interviewer and the interviewee.

See Van Liemt, in *Blanpain*, *supra* note 2, at 184.

62. See generally Virginia Leary, *The Paradox of Workers' Rights as Human Rights*, in *HUMAN RIGHTS, LABOR RIGHTS, AND INTERNATIONAL TRADE* 22 (Lance A. Compa & Stephen F. Diamond eds., 1996). See also Blackett, *supra* note 19, at 26-34.

63. The critique of the fixed-rule understanding of regulation and law proffered by Sabel *et al.*, *supra* note 39, at 5, 7-8, although sensitive to the constraints of developing countries, seems in this regard to sidestep the central interaction of state law and private ordering in the labor relations context. The proposed Ratcheting Labor Standards framework (which interestingly relies on the decidedly low technology metaphor of a "ratchet wrench" in the context of economic globalization—often perceived as high tech, despite the 19th century parallels to labor conditions) seeks to provide a fluid alternative to promote enforceable standards, but without grappling with the interplay between these corporate focused mechanisms and the already pluralistic labor relations model. More attention to labor relations as a system rather than mere standards, as well as to place, would usefully complicate the ratcheting labor standards analysis.

64. See PIERRE VERGE & GUYLAINE VALLÉE, *UN DROIT DU TRAVAIL? ESSAI SUR LA SPÉCIFICITÉ DU DROIT DU TRAVAIL* 167 (1997) (articulating the plurality of sources of labor law, notably collective bargaining).

65. See Jean-Marie Fecteau, *Du droit d'association au droit social : Essai sur la crise du droit libéral et l'émergence d'une alternative pluraliste à la norme étatique, 1850-1930*, 12 *CAN. J. L. & SOC.* 143

foundation of freedom of association, the legitimating factor of the organizations' existence and representativity.⁶⁶ Drawing on this representative capacity, workers and employers' associations were permitted to create the law that applied to them.⁶⁷ In certain contexts, the law that they created could even be extended by the State to cover other similarly-situated individuals.⁶⁸ For Fecteau, this model somewhat challenged the unitary notion of the liberal legal system, and the coexistence of worker-created law and state law succeeded, temporarily, because the partial trade-off in favor of a welfare-state provided certain social rights to citizens. As eminent legal scholar Harry Arthurs explains:

This is not to argue that collective bargaining – or any of the other regimes – necessarily operated in total isolation from the state. In various societies, at various times, collective bargaining has been tolerated, encouraged, licensed, regulated, or co-opted by the state. But the most distinctive feature of collective bargaining is not its nexus with the state; rather it is that collective bargaining relies upon employers and workers to generate and enforce the norms which govern workplace behaviour.⁶⁹

Both Fecteau and Arthurs contend that the unravelling of the welfare state in a post-Keynesian era might call for this paradigm to be reconsidered.⁷⁰

A new paradigm has indeed emerged,⁷¹ and codes of corporate conduct may be viewed as attempts to grapple with it. At their best, the codes of corporate conduct may permit the application and enforcement of common, socially just rules across territorial boundaries to individual workplaces, thereby linking plants around the world with the distant MNE and the consuming public. This wide and tangled web is deemed necessary given the new international division of labor, which has been described as a flexible

(1997).

66. *Id.* at 151 (noting that the basic rule was that the power of the association is limited to its members, and its ability to act is also seriously restricted).

67. *Id.* at 155.

68. The legal decrees (“décrets de lois”) are examples of this phenomenon. See, e.g., GÉRARD LYON-CAEN & JEAN PÉLISSIER, *DROIT DU TRAVAIL*, (16th ed. 1992); JEAN-LOUIS DUBÉ, *DÉCRETS ET COMITÉS PARITAIRES: L'EXTENSION JURIDIQUE DES CONVENTIONS COLLECTIVES* (1990).

69. Harry W. Arthurs, *Labor Law Without the State?*, 46 U. TOR. L. J. 1, 3 (1996).

70. Fecteau, *supra* note 65, at 156-57; Arthurs, *supra* note 69, at 4.

71. For a leading account of these changes, see generally Arthurs, *supra* note 69.

system of accumulation in which corporations outsource production to different producers and component assemblers around the world.⁷²

Codes of corporate conduct also coexist with traditional forms of labor regulation. In an economic context in which new and old forms of production interact,⁷³ complement, and challenge each other, it may be acceptable, even desirable, to adopt a layered vision of labor regulation that is responsive to differences across and within labor law systems and relations between States.⁷⁴ On an optimistic view of the interaction between old and new, codes of corporate conduct provide a form of regulatory control that allows a broader range of stakeholders in workplace justice (like consumers in receiving countries) to use their leverage vis-à-vis MNEs to regulate human rights across borders. These initiatives would coexist with traditional State regulation, to ensure that local standards are respected and to provide additional means by which local workers may exercise their collective rights.

However, the models are not merely overlapping mechanisms, nor are they extensions of State control across transnational borders.⁷⁵ The codes of corporate conduct and their enforcement mechanisms signify a crucial theoretical departure from traditional industrial relations principles. They are essentially an extension of management power to self-regulate,⁷⁶ but in a domain that would traditionally be addressed through one of two means: protective legislation adopted by the State, or collective bargaining. In the place of dispute resolution mechanisms, monitoring mechanisms extend management power. The extension is often indirect, at least to the extent that

72. See HARVEY, *supra* note 13, at 190-92. See also Van Liemt, in Blanpain, *supra* note 2, at 178 (describing just-in-time production practices as they apply to the relationship between local subcontractors and multinational enterprises).

73. See James H. Mittelman, *The Dynamic of Globalization*, in GLOBALIZATION: CRITICAL REFLECTIONS 1, 5 (James H. Mittelman ed., 1996); BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW COMMON SENSE: LAW, SCIENCE AND POLITICS IN THE PARADIGMATIC TRANSITION 270 (1995).

74. Max Rood predicts that labor law will respond to the pluralist and decentralizing tendencies in society by eliciting different instruments to cope with a range of circumstances and needs of the different social actors. See Max G. Rood, *Internationalization: A New Incentive for Labour Law and Social Security*, in LABOUR LAW AT THE CROSSROADS: CHANGING EMPLOYMENT RELATIONSHIPS 139, 144 (J.R. Bellace & M.G. Rood eds., 1997).

75. An example of the extension of State control across transnational borders is the North American Agreement on Labor (NAALC), which grants the regional framework of rights and recourse under the regional framework of the North American Free Trade Agreement. For a description of the NAALC mechanism, and others that overlap with the traditional forms of labor regulation, see Katherine Van Wezel Stone, *Labor and the Global Economy: Four Approaches to Transnational Labor Regulation*, 16 MICH. J. INT'L L. 987, 1006-11 (Summer 1995).

76. See VERGE & VALLÉE, *supra* note 64, at 168-69 (arguing that management power represents a unilateral form of rule-making in the workplace and stressing that this approach contrasts sharply with labor regulation through collective bargaining and state regulation).

the monitoring is considered “independent;” indeed, various steps are taken to ensure that monitors are certified, and themselves audited. However, it is the monitoring framework itself, structured along business accounting principles, that more aptly captures the expansion of management power. Labor standards are quantified, but labor relations are overlooked.⁷⁷ In contrast to the classic terrain of legal pluralist analysis, *lex mercatoria*⁷⁸—or, law developed by corporations to govern their own relationships—these corporate self-regulatory initiatives enable MNEs to extend their laws directly to workers along the global production chain, disregarding, even undermining, local enforcement efforts. Monitoring instead extends the ways that management would approach the product, as in the SA8000 example, to the relationship of subordination of its workers.

III. ECONOMIC GLOBALIZATION AND THE CHALLENGE OF CODES OF CORPORATE CONDUCT

If corporate self-regulatory initiatives have gained some currency, it is in no small measure because the workers’ advocacy efforts surrounding them simultaneously reflect an understanding of the asymmetries of economic globalization⁷⁹ and problematize the dominant conception of globalization by defying the perception that it is inevitable. However, in the process, the efforts

77. A recent critique by MIT professor Dara O’Rourke of the monitoring methods of PriceWaterhouseCoopers (PwC) confirms this assessment. O’Rourke found that PwC’s monitoring methods were “significantly flawed,” exhibiting a management bias in their standard auditing tools and approach. O’Rourke found that many major labor violations were missed by auditors. The problems, O’Rourke concluded, “go beyond the level of poorly trained auditors and flawed audit protocols. The significant and seemingly systematic biases in PwC’s methodologies call into question the company’s very ability to conduct monitoring that is truly independent.” See Dara O’Rourke, *Monitoring the Monitors: A Critique of PriceWaterhouseCoopers (PwC) Labor Monitoring*, Sept. 28, 2000, available at <http://www.cleanclothes.org/codes/pwc-critique.htm>. (last visited May 31, 2001).

78. See DE SOUSA SANTOS, *supra* note 73, at 469 (discussing the various forms taken by the conflict between the “transnational legal space” of *lex mercatoria* and the “national state legal space:” the contracts introduce vague clauses on applicable law such as the general principles of law, the usages of commercial life, the only purpose being to eliminate or evade the application of state law; the arbitration system is often resorted to with the same purpose; commercial partners enter gentleman’s agreements or protocols that often violate national laws (particularly those on fair competition; the national legislation enacted to police the contracts of transfer of technology has little efficacy; powerful multinational corporations impose their laws on the states)).

79. For a discussion of the broad contours of the globalization narrative, see Adelle Blackett, *Globalization and Its Ambiguities*, 37 COLUM. J. TRANSNAT’L L. 57, 60–66 (1998). On the broader question of global governance, as opposed to government or formal interstate organization, see David Kennedy, *New Approaches to Comparative Law: Comparativism and International Governance*, 2 UTAH L. REV. 545, 548 (1997).

risk reinforcing that dominant perception by obscuring the role of the State. Given the limits that certain States face on their ability to act, however, the transformative potential of the efforts may emerge if they can be harnessed to shine a spotlight on structural problems and thereby compel deeper transnational collaboration.

A. Asymmetry

Economic globalization is generally perceived as symmetrical or uniform.⁸⁰ This characterization obscures patterns of dependency and the ways that specific places interact with and challenge the global.⁸¹ Whole regions of the world, and various sectors of the economy, have either been left out of the globalization phenomenon, or left behind in the literally “less than global” analyses.⁸² Similarly, the perception of globalization as a linear development across undifferentiated terrain overlooks the importance of place in the globalization process.

In many developing countries, the asymmetry is reflected in material constraints that lead to a mushrooming of the “informal sector” and that prevent State labor inspection services and industrial relations dispute resolution mechanisms from functioning fairly and efficiently in the adversarial workplace context.⁸³ Similarly, under the weight of structural adjustment programs imposed by international financial institutions in the

80. See R.J. BARRY JONES, *GLOBALISATION AND INTERDEPENDENCE IN THE INTERNATIONAL POLITICAL ECONOMY: RHETORIC AND REALITY* 33 (1995). Jones challenges this view, by contending that “the interconnectedness of the contemporary international political economy exhibits marked asymmetries and imbalances, which underpin, and are reflected in, serious dependencies.”

81. See generally Buchanan, *supra* note 9, at 371.

82. See Muchlinski, *supra* note 22, at 102 (asking the question “how far can the interests of MNEs from developed home states create a legal order that refers to their culture and practices, rather than those outside this cultural sphere?” and positing that “the capacity of local communities to destabilize” emerging global business law is a necessary ingredient in any measure of the success of the global business law project).

83. See generally *GLOBALIZATION AND THIRD WORLD TRADE UNIONS: THE CHALLENGE OF RAPID ECONOMIC CHANGE* (Henk Thomas ed., 1995); Romero, *supra* note 3, at 408 (noting the shortcomings of labor institutions that extend beyond EPZs and suggesting better coordination between labor and EPZ authorities to streamline inspections and promote regulatory compliance). See also Arthurs, *Private Ordering*, *supra* note 20, at 13-14 (suggesting that the differences between the ideal model of labor regulation and the flawed reality render the appraisal of codes of corporate conduct more ambiguous). But see Sabel *et al.*, who, while acknowledging the need for “extensive inspectorates and other administrative capacities to monitor firms, sanction violators, and counter their evasion efforts,” suggest that a private regulatory model should be favored instead of finding ways to reinforce the regulatory capacities of states. A real strength of their work, however, is its attention to the informal sector, which often falls outside of current regulatory regimes. See Sabel *et al.*, *supra* note 39, at 14-15, 28-31, 33.

wake of debt restructuring, many developing countries have been forced to re-regulate their social sectors, sometimes to the detriment of labor relations machinery.⁸⁴ Globalization has an asymmetrical impact on the scope and effectiveness of labor laws in developing countries; these deficiencies leave the terrain open for alternative non-State approaches.

Codes of corporate conduct have been somewhat effective at raising public awareness primarily because they recognize and draw upon one of the asymmetries of economic globalization: although goods may be produced in many parts of the world, the overwhelming majority are imported by a few rich, industrialized countries.⁸⁵ Purchasing power in this small number of countries is drawn upon to influence the actions of MNEs. This consumer-power strategy is particularly effective in industries such as designer apparel and footwear, where brand-name loyalty is crucial⁸⁶ and by necessity renders the products readily identifiable by the consumer as a product of the MNE rather than of its many anonymous overseas sub-contractors.⁸⁷ These links along the production chain offer a glimmer of regulatory possibilities that transcend state frontiers.⁸⁸

84. See Seventh MNE Declaration Survey, *supra* note 8, at 112, ¶ 202. See also Vito Tanzi, *The Changing Role of the State in the Economy: A Historical Perspective*, Working Paper of the International Monetary Fund WP/97/114, at 7 (Sept. 1997), available at <http://www.imf.org> (last visited May 31, 2001) (arguing that although it would appear that less developed countries would benefit from a larger government role, supplementing market imperfections, they are the least likely to be able to deal with these deficiencies. The author also maintains that "purely social" regulations, such as "controls on working hours, minimum wages, and length of work week," are of debatable usefulness). A later version of this paper is published in VITO TANZI, (POLICIES, INSTITUTIONS AND THE DARK SIDE OF ECONOMICS 12-32 (2000)). For an ILO attempt to reach a consensus on the respective mandates of the World Bank and the ILO on labor law reform in francophone Africa, see WORLD BANK & ILO, *La réforme du Droit du Travail en Afrique francophone: Actes du Séminaire par le Bureau International du Travail et la Banque mondiale* (June 30-July 3, 1997). The Governments, as well as workers and employers representatives at the seminar adopted Conclusions that affirmed that labor law can provide workers with adequate protection while taking into consideration economic efficiency and the productivity of enterprises. *Id.* at 26. The Conclusions cited the benefits of establishing a balance between the interests of workers and employers through collective action, and the ability to promote confidence between workers and employers through the establishment of transparent workplace procedures. *Id.*

85. See HIRST & THOMPSON, *supra* note 7, at 82-83.

86. The reputation value of the brand name is consequently crucial to self-regulatory initiatives. A 2000 accountant's survey of 1000 Canadian companies emphasized that the most influential reason to invest resources in ethics initiatives was "protection or enhancement of reputation." See KPMG Canada, *KPMG Ethics Survey 2000-Managing for Ethical Practice*, at <http://www.kpmg.ca/english/services/fas/publications/ethicssurvey2000.html> (last visited Apr. 14, 2001).

87. It is perhaps not surprising that the OECD Inventory found that fair employment and labor rights were mentioned 90% of the time in codes of corporate conduct in the light industry sector, which includes apparel, textiles and footwear. See OECD Inventory, *supra* note 1, at 12-13.

88. See Arthurs, *Private Ordering*, *supra* note 20, at 11-12 (observing that "[e]ach stage in the production process, each border crossed, each market served, each part of the larger corporate empire is

Yet, by focusing on the places of production, the dichotomy becomes clear: corporate self-regulatory initiatives leave unanswered a series of critical coherence and feasibility questions in the labor regulatory environment. At a most basic level, the utility of holding corporations to “local standards” where local markets have been “deregulated,” regulated down, or where laws remain unenforced must be questioned. The effective redefinition of “local standards” is itself at stake. Turning attention away from the media-ready solutions offered by codes of corporate conduct and toward the particulars of these places may redirect attention onto the need to address these concrete questions. A principled starting point from a labor regulation perspective would ensure that spaces for democratic governance emerge in these re-regulated zones.

B. Inevitability

Economic globalization is also considered to be an inevitable,⁸⁹ inalterable process, beyond the control of public policy.⁹⁰ Human rights advocacy challenges this unidirectional vision. Consumers, trade unions, and NGOs step into the regulatory arena to problematize and possibly alter corporate actions through the promotion of codes of corporate conduct. They do so while using or subverting other developments that are frequently associated with globalization “such as the increased ability to gather information and cooperate across borders, often via rapidly developing communications technology.”⁹¹

potentially a site where employment practices can be called into question [I]t is in the interest of transnational corporations to cosmeticise conflict, if they can . . . which can be facilitated by adopting voluntary codes.”). See also HARVEY, *supra* note 13, at 358 (noting that “when British Ford car workers struck and stopped car production in Belgium and West Germany, they suddenly realized that spatial dispersal in the division of labour is not entirely to the capitalists’ advantage and international strategies are feasible as well as desirable”).

89. Robert W. Cox, *A Perspective on Globalization*, in GLOBALIZATION: CRITICAL REFLECTIONS 21, 23 (James E. Mittelman ed., 1996) (referring to this phenomenon as the ideology of globalization, in which “[g]lobalization began to be represented as a finality, as the logical and inevitable culmination of the powerful tendencies of the market at work”). The argument is oddly deterministic—the difference from economic determinism is that it is considered non-normative. See JONES, *supra* note 80, at 13-14 (arguing that globalization need not necessarily be beneficial or detrimental to be inevitable).

90. See ROLAND ROBERTSON, GLOBALIZATION: SOCIAL THEORY AND GLOBAL CULTURE 61-62 (1992), (rejecting this depiction). Drawing on Wallerstein’s work, he contends that “conceptions of the world-system, including symbolic responses to and interpretations of globalization, are themselves important factors in determining the trajectories of that very process.” For Robertson, “its direction and outcome, and hence the shape of the global field itself, are still very much ‘up for grabs.’” *Id.*

91. According to O’Brien,

Accompanying the drive to lower labor costs has been the expansion of new communications technology which has permitted the victims of such activity to broadcast their plight. Cheaper air travel, portable video recorders, lower telephone

Their activities suggest that there is no one, linear course to globalization,⁹² and that civil society can play a role in contesting the dominant conception.

C. Obscured Role of the State

The perceived inevitability of globalization tends also to obscure the role of the state by rendering it the mere implementor of globalization's exigencies. As attention is focused on the ways in which globalization challenges and diminishes State action,⁹³ the ways in which the State—and certain States in particular—foster the global economy, and legitimize new forms of legality, are overlooked.⁹⁴ The risk is thus that the role of the State—or certain States, notably in the countries where the bulk of consumption takes place—becomes further obscured.

NGOs that promote codes of corporate conduct might reinforce this perception, possibly to the detriment of their traditional métier, lobbying governments for regulatory action, be it at the local, national or transnational level.⁹⁵ NGOs have traditionally been seen as gadflies, bringing to a range of

costs, the Internet and e-mail have all been used to inform the public about labor abuses in the manufacturing process. The distribution of stories about child workers in the carpet industry, fires in toy factories, or the abuse of female factory workers has led to a growing outcry amongst non-governmental organizations in numerous countries.

O'Brien, *Commentary*, *supra* note 7, at 160. See also Krut, *supra* note 20, at 46-47 (providing examples of several advocacy initiatives that have harnessed new technologies for their information sharing and strategic work).

92. See Gunther Teubner, 'Global Bukowina': *Legal Pluralism in the World Society*, in *GLOBAL LAW WITHOUT A STATE*, *supra* note 14 at 1, 5 (arguing that "[t]he modern experience . . . is of a fragmented rather than a uniform globalization. . . . a highly contradictory and highly fragmented process in which politics has lost its leading role.").

93. See SASSEN, *DISCONTENTS*, *supra* note 4, at 196 (arguing that the tendency to emphasize the "hypermobility and liquidity of capital" remains only a "partial account" of the story of globalization).

94. Although Robé adopts a pluralist approach to notions of sovereignty, notably in relation to MNEs, he nonetheless recognizes that "States have deliberately let these orders develop, albeit under pressure of competition among themselves; indeed, they could hardly have done differently." See Robé, *Multinational Enterprises*, *supra* note 14, at 68; see also SASSEN, *DISCONTENTS* *supra* note 4, at 200 (arguing that "[d]eregulation and kindred policies constitute the elements of a new legal regime dependent on consensus among states to further globalization").

95. There is a degree of irony, moreover, to the human rights advocacy by NGOs that emphasizes voluntary, non-state-centered approaches. Recall that whenever the debate on whether to include social clauses within trade agreements is raised, considerable attention tends to be placed on the perception that linking labor standards to trade would be tantamount to a denial of sovereignty to individual states to determine their own labor policy. Yet, with corporate consumer movements, individual states are effectively being asked (or more often are not asked) to cede regulatory authority over labor matters through privatized, self-regulatory initiatives. See Singapore Ministerial Declaration, WT/MIN(96)/DEC/W, (Dec. 13, 1996). For a current discussion of the social clause issue, see Blackett, *supra* note 19, at 43-47.

actors a plethora of key concerns, and galvanizing primarily States and intergovernmental organizations into action. Indeed, it is not at all clear whether the majority of NGOs are interested in displacing the States, by themselves claiming the authority or assuming the responsibility associated with making and enforcing key public policy decisions.⁹⁶ Yet, the more privatized models of labor rights advocacy leads logically to this outcome.⁹⁷

Trade policy is one element that obscures the role of the state. However, it also illustrates the real limits that have been imposed on regulatory power in some regions. Through their active participation in the world trading regime, many states have adopted liberalization policies that have placed certain matters beyond domestic control. For example, by turning its attention to non-tariff barriers, notably government subsidies, the WTO has entered the domain of governmental policy setting and regulation.⁹⁸ Simply put, governments cannot regulate as they might have before. The ability that governments in industrialized countries had to step into the labor market (e.g., with a wide range of government subsidies to stimulate employment in particular sectors and regions) is increasingly curtailed by trade agreements that they have signed at regional and international levels. In developing countries, this role was made possible by international financing, but the predictable debt crisis that has ensued—and the austere structural adjustment plans that have resulted—undermine States' abilities to promote employment and fund labor relations machinery. Viewed in this light, a certain regulatory deficit in the labor domain already exists.

Conditions of regulatory competition also affect the role of the state, by leading individual States to regulate-down or under-enforce labor standards, particularly in certain sectors of their economies.⁹⁹ The need to attract foreign

96. See Krut, *supra* note 20, at 49 (concluding that the role of civil society in global governance is "to influence agents and act as moral compasses, not to replace states or an intergovernmental process").

97. Indeed, Sabel *et al.* explicitly endorse this outcome, and recommend that international organizations like the ILO and the World Bank "coax national governments to adopt [ratcheting labor standards]-compatible labor law by developing model legislation and international covenants." See Sabel *et al.*, *supra* note 39, at 33. They candidly assert that, "convictions aside, these institutions might be drawn to support this regulatory alternative because it frees them from adjudicatory responsibilities they are ill equipped to handle, while allowing them to participate in the articulation of feasible standards according to principles they know from the arenas of economic development and trade: transparency and competition." *Id.*

98. See Frieder Roessler, *Diverging Domestic Policies and Multilateral Trade Integration*, in FAIR TRADE AND HARMONIZATION, *supra* note 54, at 41.

99. One example, highly centered on brand name loyalty, is the footwear and clothing industry. See ILO, REPORT FOR DISCUSSION AT THE TRIPARTITE MEETING ON THE GLOBALIZATION OF THE FOOTWEAR, TEXTILES AND CLOTHING INDUSTRIES: EFFECTS ON EMPLOYMENT AND WORKING CONDITIONS (1996), available at <http://www.ilo.org/public/english/dialogue/sector/sectors/textile.htm> (last visited May 31,

direct investment is often at odds with government labor regulatory responsibilities. The simple threat of exit by MNEs can be sufficient to induce many nation states to loosen regulatory apparatuses.¹⁰⁰ Collective action problems exist; the extent to which they may encourage a "race to the bottom" remains open to empirical inquiry.¹⁰¹ In this case as well, State action in one area leaves the State with a limited range of policy options in other areas.

In the face of these limits on State action, corporate self-regulatory initiatives draw on a degree of flexibility that States cannot as easily attain.¹⁰² Rather, they creatively overcome some of the immediate realities of select groups of people living in different parts of distinct developing countries. The initiatives may shed light on the fact that many developing States are simply unable to legislate away major social and redistributive problems that are linked to labor standards violations.¹⁰³

It is conceivable that the beginnings of a new, decentered regulatory

2001).

100. See Gerald Epstein, *International Capital Mobility and the Scope for National Economic Management*, in *STATES AGAINST MARKETS: THE LIMITS OF GLOBALIZATION* (1996) 211, 212, 220 (Robert Boyer & Daniel Drache eds., 1996).

101. See Langille, *General Reflections*, *supra* note 54, at 254-55 (quoting MICHAEL J. TREBILCOCK & ROBERT HOWSE, *THE REGULATION OF INTERNATIONAL TRADE* 7 (1995)). See also Mark Barenberg, *Federalism and American Labor Law: Toward A Critical Mapping of the "Social Dumping" Question*, in *HARMONIZATION OF LEGISLATION IN FEDERAL SYSTEMS* 93 (Ingolf Pernice ed., 1996). One important recent example is in the Caribbean region. The region comprises micro States with open, yet not very diversified economies. They are characterized by small GDPs, yet reasonably high per capita incomes and generally well-educated English speaking populations. Most are member States of the CARICOM regional trade arrangement. When one MNE based in Barbados "hinted" that it might be more economical to transfer its operations to a neighbouring island because of its disagreement with the local voluntarist approach to the recognition of trade unions, ministers of labor in the CARICOM, trade unions and employers' organizations met. The member States decided that the company would not be welcomed in another CARICOM member State were it to seek to transfer its operations. Ultimately, the company decided to stay. See ILO Governing Body, Subcommittee on Multinational Enterprises, GB.280/MNE/1/2, 280th Session, Geneva, Mar. 2001 (Part II) at 301, available at <http://www.ilo.org/public/english/standards/relm/gb/docs/gb280/pdf/men-1-2.pdf> (last visited June 14, 2001).

102. This flexibility differs from the euphemistic form of flexibility that has become synonymous with the economic liberalization, facilitated by the removal of workplace regulations such as protection against dismissals.

103. A particularly poignant example is found in attempts to eradicate child labor. Consider that after the advocacy and media attention surrounding the "foul ball" campaign in Bangladesh, soccer ball manufacturers initially threatened simply to fire the children whom they employed to sew their product. Instead, the U.S. government and two international organizations, UNICEF and the ILO, intervened, and a deal was brokered between the local association of manufacturers, UNICEF, and the ILO. Under the terms of that agreement, the children who had been working would be paid to attend school until the age of fifteen, and older family members would be hired to replace them. Ultimately, the spotlight effect forced a response, but to avoid a thoroughly unsatisfactory outcome, inter-state agencies became central to the resolution. See Steven Greenhouse, *Sporting Goods Concerns Agree to Combat Sale of Soccer Balls Made by Children*, N.Y. TIMES, Feb. 14, 1997, at A1, A17.

infrastructure might be rooted in this flurry of individual, often mediatized, solutions. It is even plausible that consumer-based movements to monitor codes of corporate conduct could reinforce transnational solidarity, allowing NGOs in the West to convert workers' concerns into viable regulatory schemes. However, the more publicized examples (and, consequently, the ones that are most effective at spotlighting labor rights violations) tend to be highly selective, focusing on issues that are at the forefront of Western consumers' concern.¹⁰⁴ Some NGOs have contributed to this selectivity by facilitating media sensationalization of the "plight" of workers in developing countries without promoting a deeper understanding of the material conditions in those particular places.¹⁰⁵ Barriers to sustained, standardized communication of information are prevalent.

Moreover, as currently crafted, corporate self-regulatory initiatives rarely permit the direct engagement of local trade unions and human rights organizations in product-exporting countries.¹⁰⁶ Similarly, they fail to challenge the power of MNEs to determine working conditions without the participation of the workers concerned. The protective value of the codes is therefore questionable, and the democratic participation of local workers is overlooked.

It is important to add that capital flight has in some cases been the response to labor advocacy applying codes of conduct to particular places.¹⁰⁷ It is therefore crucial to avoid the tendency to romanticize the disruptive power of civil society¹⁰⁸ by failing to grapple with the power of MNEs.¹⁰⁹ The ability

104. The predominant attention given to child labor is one example of this phenomenon. The attention given to different labor rights tends also to vary depending on the particular country in which the products are marketed and sold. For example, freedom of association issues are reported to be more commonly addressed in European codes than in U.S. codes. See Janelle M. Diller, *Social Conduct in transnational enterprise operations: the role of the International Labour Organization*, in Blanpain, *supra* note 2, at 17.

105. See Krut, *supra* note 20, at 13.

106. Although some NGOs based in MNE home countries appear to have developed close ties to local workers' representatives, others seem to act on the premise that the protective potential of the labor rights initiatives justifies the lack of local involvement in their establishment.

107. Indeed, the mere ability to threaten flight significantly affects both privatized human rights initiatives and state regulation. See Langille, *General Reflections*, *supra* note 54, at 237.

108. See Held, who remarks that "[a]n appeal to the nature or inherent goodness of grass-roots associations and movements bypasses the necessary work of theoretical analysis." DAVID HELD, *DEMOCRACY AND THE GLOBAL ORDER* 286 (1995).

109. According to Krut, "[t]hese groups technically are NGOs and are increasingly visible at international political events, but their credibility as representatives of civil society is frequently challenged. . . . Their disproportionate financial power gives their legitimate lobbying activity far more efficacy than that of other NGO groups." See Krut, *supra* note 20, at 20. But see SASKIA SASSEN, *LOSING CONTROL: SOVEREIGNTY IN AN AGE OF GLOBALIZATION* 27 (1996) ("both the global capital market and human rights codes can extract accountability from the state. . . . Both have gained a kind of legitimacy.") [hereinafter

of MNEs to consolidate their control over the means of production, to transform that control into power, and to exercise that power transnationally¹¹⁰ underscores the existence of a global context in which various legal orders with distinct and conflicting interests coexist and challenge each other. In the labor context, attention must be given to the ways that State action—nationally and internationally, by some States differently than by others—can be reconstituted to counterbalance the power that MNEs exercise over workers.

In sum, corporate self-regulatory initiatives have been better at spotlighting selected, often poignant examples of certain kinds of labor rights abuses than at exposing the layers of complexity surrounding compliance with labor standards while crafting broadly satisfying solutions. The challenge is to prevent that attention to individual situations from eclipsing the harder, more systematic, but indispensable work of addressing broader structural problems in a sustainable, consistent, and equitable fashion. In other words, by explicitly considering the importance of place, corporate codes can broaden the discussion¹¹¹ of labor rights to address the frequent inability of developing countries and transition economies to provide functional labor inspection and dispute resolution services, not to mention suitable schools. Solving these problems will necessitate concerted, complex transnational interactions. In this sense, despite the elements of globalizing discourse that question the relationship between the state and the private sector, the more pertinent inquiry in the already pluralistic labor law context should focus on the redefinition of the rights of workers and the power of employers.¹¹² To do so, it would be

SASSEN, LOSING CONTROL].

110. See Robé, *Multinational Enterprises*, *supra* note 14, at 69-71. Robé observes that The liberal system of the exercise of power is based on the presupposition which is invalidated by the development of the corporate economy: in the liberal state of law, the control of means of production is not treated as a power, which rejects its manifestations out of the sphere of public law's concern. In the spirit of the liberal constitution, as it was conceived in the late eighteenth century, and in the reality of the facts of the time, the control of the means of production is diffused within the whole of society. The political ideal glimpsed at that time was one of a republic of small owners, unable to transform means of production into power by concentrating them. But the Industrial Revolution and the concentration of property rights—and thus of the basic, original, fundamental power to make decisions—in enterprises have changed the whole picture.

Id. at 71 (internal citations omitted).

111. See Kolk, *supra* note 34, at 171 (contending that “[c]odes—now more than ever before—have the function of deciphering the limits of regulation and the roles of governments, firms and representatives of civil society. Codes are an ‘entry to talk.’ The agenda-setting potential of codes, therefore, should not be underestimated.”)

112. See Supiot, *supra* note 56, at 205.

important to raise the hard questions that are linked to the decentering of the State by focusing on the significance of particular places of production, and by probing representation and democratic governance. To accept that MNEs are indeed acting as regulators over particular places puts the normative question—who should regulate—in stark relief.

IV. DECENTERING THE STATE: REPRESENTATION THROUGH COSMOPOLITAN DEMOCRATIC PARTICIPATION

The patchwork of analysis on globalization and global governance that is found in the notion of the decentered State¹¹³ might provide a helpful starting point for shaping emerging forms of pluralist labor regulation. That literature complements the two analytical frameworks used in this Article to examine codes of corporate conduct—legal pluralism and economic globalization. By focusing on the complexity and composition of “the State,” it seeks to dislodge the grip of narrow notions of sovereignty, pointing instead to the potential of overlapping, fragmented, layered sovereignties.¹¹⁴ That literature has developed a notion of cosmopolitan democratic governance,¹¹⁵ attentive to individuals and groups as rights holders¹¹⁶ and actors in transnational spaces, that can usefully be imported into the discussion of labor rights.

To the extent that independent, representative NGOs and trade unions play a central role in the movement to establish corporate codes of conduct, by insisting that corporations assume some direct responsibility for the human rights consequences of their transnational exploits, they contribute to a more layered notion of sovereignty. However, in labor relations law, where overlapping sovereignty in the creation of workplace law already exists through state frameworks, the contribution is less than clear.

Instead, a decentering that acknowledges the already pluralistic foundations and aims of labor law, but seeks to broaden both its representative

113. See, e.g., SASSEN, *LOSING CONTROL*, *supra* note 109. See also Karen Knop, *Re/Statements: Feminism and State Sovereignty in International Law*, 3 *TRANSNAT'L L. & CONTEMP. PROBS.* 293 (1993); Anne-Marie Slaughter *et al.*, *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 *AM. J. INT'L L.* 367, 378, 390 (1998).

114. See Robé, *Multinational Enterprises*, *supra* note 14, at 55-56.

115. I borrow the term “cosmopolitan democracy” from David Held, who rethinks democracy in light of “overlapping local, regional and global processes.” He draws on a notion of democracy that engages the accountability of a range of related and interconnected power systems. HELD, *DEMOCRACY AND THE GLOBAL ORDER*, *supra* note 108, at 267.

116. See, e.g., Andrea Bianchi, *Globalization of Human Rights: The Role of Non-state Actors*, in *GLOBAL LAW WITHOUT A STATE*, *supra* note 14, at 179, 180.

scope (to the new workers who are the subject of its regulations) and its geographic scope (to the particular places where MNEs locate their production overseas), is more likely to promote the protective and participatory principles that labor law espouses. This is the terrain of “cosmopolitan democracy.”

A. ‘Cosmopolitan Democracy’ and the Transnational Workplace

By invoking “cosmopolitan democracy,” I start from the premise that democracy entails more than simple majority voting rights. I also link democracy to the ability of stakeholders to have a say in decisions that affect them.¹¹⁷ Further, I assert that the workplace is a key locus for a more participatory form of democracy to emerge.¹¹⁸ As the workplace becomes increasingly transnational, so too must the rights of democratic participation stretch across and beyond national borders.¹¹⁹

This process of “deepening and extending democracy across nations, regions and global network[s]”¹²⁰ is what Held refers to as “the entrenchment of democratic autonomy on a cosmopolitan basis,”¹²¹ hence “cosmopolitan democracy.” For Held, cosmopolitan democracy draws attention to the “system of governance which arises from and is adapted to the diverse conditions and interconnections of different peoples and nations.”¹²² Held considers the notion to encompass the development of a transnational

117. There is of course a voluminous literature on participatory democracy. For an articulation that comes closest to the underlying considerations of this piece, see generally IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* (1995). See also Colleen Sheppard, “Equality Rights and Democratic Theory,” May 16, 2000 (paper presented to the McGill Centre for Research and Teaching on Women) (exploring connections between evolving conceptions of equality rights and participatory democracy) (unpublished manuscript on file with the author).

118. This view is shared by the former chief economist of the World Bank, Joseph Stiglitz. Joseph Stiglitz, *Democratic Development as the Fruits of Labor: Keynote Address to the International Relations Research Association*, Boston, Jan. 2000, available at <http://www.worldbank.org/knowledge/chiefecon/articles/boston.htm>. (last visited May 31, 2001) (articulating the economic benefits of workplace democracy). See also Iris Marion Young, *Communication and the Other: Beyond Deliberative Democracy*, in IRIS MARION YOUNG, *INTERSECTING VOICES: DILEMMAS OF GENDER, POLITICAL PHILOSOPHY AND POLICY* 60 (1997) (stressing the need to emphasize democratic communication across differences of culture, social standing and need to arrive at an “understanding,” broadly defined).

119. Implicit is the claim that the exercise of political and economic power will continue to elude effective democratic control “while democracy remains rooted in a fixed and bounded territorial conception.” Rather, “[g]lobalization demands that we re-form our existing territorially defined democratic institutions and practices so that politics can continue to address human aspirations and needs.” See David Held & Anthony McGrew, *Globalization*, 5 *GLOBAL GOVERNANCE* 483, 495 (1999).

120. See DAVID HELD, *MODELS OF DEMOCRACY* 353 (2d ed, 1996).

121. *Id.*

122. See David Held, *Democracy and the New International Order*, in COSMOPOLITAN DEMOCRACY 96, 106 (Daniel Archibugi & David Held eds., 1995) [hereinafter Held, *New International Order*].

infrastructure,¹²³ not as a replacement for but “as a necessary complement”¹²⁴ to local and national governance structures. Also critical to the development of international institutions is the construction of “broad avenues of civic participation in decision-making at regional and global levels.”¹²⁵

Although Held’s insights are informative, this Article’s use of the notion of cosmopolitan democracy also reflects David Harvey’s intuition that “the turn to more flexible labor processes could be seen as an opening to a new era of democratic and highly decentralized labor relations and co-operative endeavours.”¹²⁶ This Article therefore deviates from Held’s proposal, which focuses on a rather different representational project, the creation of regional parliaments,¹²⁷ and instead concentrates exclusively on the creation of participatory possibilities for those most concerned with the changing workplace.¹²⁸

This Article proposes that cosmopolitan participatory democracy, as it relates to labor regulation, might be implemented at several levels: the local (that is, within specific workplaces); the national (through specific forms of regulation); and the international (through the creation of participatory spaces for democratic dialogue). Transnational initiatives will likely have an effect across and between the spaces that weave these levels together.

In the labor context, an organizing framework for this kind of participation already exists; it is captured in the notion of “tripartism,” which is the industrial relations model that exists to varying degrees in most States around the world. At its most basic level, tripartism means three-way interaction, advisory, or more, between governments, workers, and employers.¹²⁹ Tripartism is also reflected at the international level in the structure of the ILO.

123. Held focuses on the regional and international levels, paying particular attention to the United Nations. See HELD, *MODELS OF DEMOCRACY*, *supra* note 120, at 353-60; see also Held, *New International Order*, *supra* note 122, at 106-14.

124. HELD, *MODELS OF DEMOCRACY*, *supra* note 120, at 353.

125. *Id.* at 354.

126. See HARVEY, *supra* note 13, at 353.

127. See HELD, *MODELS OF DEMOCRACY*, *supra* note 120, at 354.

128. I acknowledge, however, that Held’s suggestion of “general referenda” that would cut across nations to comprise constituencies defined according to the nature and scope of controversial transnational issues aims at grassroots participation, albeit through a vehicle that may yield outcomes reflective of the status quo. See *id.* at 355.

129. See Anne Trebilcock, *Tripartite Consultation and Cooperation in National-Level Economic and Social Policy-Making: An Overview*, in ANNE TREBILCOCK ET AL., *TOWARDS SOCIAL DIALOGUE: TRIPARTITE COOPERATION IN NATIONAL ECONOMIC AND SOCIAL POLICY-MAKING* 1, 3 (1994) (clarifying that tripartite cooperation can encompass bipartite activities between employers and workers’ representatives, where the government is the silent partner that establishes parameters, as well as broad participation by those actors in the administration of state institutions, notably in the field of occupational health and safety.)

In the annex to the ILO's constitution, the Declaration of Philadelphia states that the ILO considers "the representatives of workers and employers [to enjoy] equal status with those of governments."¹³⁰ The Declaration of Philadelphia crafts a role by which they "join . . . in *free discussion* and *democratic decision* with a view to the promotion of the common welfare."¹³¹ Accordingly, within all structures of the organization, "social partners" have direct rights of participation. Tripartism embodies the traditional labor law paradigm through which the objectives of worker protection and democratic participation were to be realized. The ILO is seen historically as a broadly representative forum, an early and still relevant example of how the State might be decentered in international fora while retaining a pivotal role in determining policy.

This rather unique international organizational model has recently gained renewed attention. For some, it evokes the possibilities for a participatory approach to other international policy matters, like environmental concerns.¹³² For others, it represents an outdated, ossified entrenchment of certain corporatist¹³³ monopoly interests, which fail to reflect the extent to which the working world has changed.¹³⁴

130. ILO CONST. annex, Article I, available at <http://www.ilo.org/public/english/about/iloconst.htm>.

131. *Id.* (emphasis added).

132. See DANIEL ESTY, GREENING THE GATT: TRADE, ENVIRONMENT AND THE FUTURE 73-98 (1994) (arguing for a Global Environmental Organization). See also Jeffrey L. Dunoff, *Resolving Trade-Environment Conflicts: The Case for Trading Institutions*, 27 CORNELL INT'L L.J. 607, 622-24 (1994); Jeffrey L. Dunoff, *From Green to Global: Toward the Transformation of International Environmental Law*, 19 HARV. ENVTL. L. REV. 241, 260 (1995).

133. For a discussion of corporatism as it relates to democratic theory, see HELD, MODELS OF DEMOCRACY, *supra* note 120, at 226-31. Held argues that:

In the corporatist account, the directive capacities of the state have increased, allowing it to construct a framework for economic and political affairs. In return for direct channels of bargaining with state officials—a 'representational monopoly'—leaders of key organized interests . . . were expected to deliver support for agreed policies and, if necessary, keep their own members firmly in line. The politics of negotiation became systematized along stricter, more formal lines, although most of the discussion between parties took place informally, behind closed doors and out of public view. A few key organizations participated in the resolution of pressing questions in exchange for relatively advantageous settlements for their members. Corporatist arrangements were, then, political strategies for securing the support of dominant trade unions, business associations and their respective constituencies.

Id. at 227-28.

134. Held discusses the critique that the special rights given to dominant, powerful groups at the national level erodes the broader electoral support of more vulnerable groups, as well as respect for traditional institutions for conflict to be channeled, such as collective bargaining. See *id.* at 231. Internationally, serious concerns are raised about the representativeness of mainstream trade unions and employers' organizations, and the relative lack of representation of other members of civil society.

It is true that one strand of criticism considers the corporatist State to be fundamentally anti-democratic, as it tends to bypass parliamentary process in favor of exclusionary, opaque, tripartite decision-making. However, that critique is not only tempered by the limited scope of such decision-making;¹³⁵ it also seems somewhat beside the point, as economic policy is increasingly formulated beyond the reaches of national actors. The importance of input by civil society members across local, national, and transnational borders is increasingly recognized. To the extent that tripartism understands the State in its relation to labor relations as being a composite of civil society and key economic actors, the notion may provide a way to reintroduce the State—in its decentered form—and reintroduce worker agency into transnational attempts to achieve more equitable workplace relations. Indeed, the more relevant critique of corporatism focuses on the current representative nature of the traditional representatives of labor and employers. It is by rethinking notions of representation that a more cosmopolitan democratic model, anchored in the broad principle of tripartism, has the most potential in the transnational economic context.

B. Tripartite-Plus Representation

Representation is at the heart of the sometimes strained relationship between NGOs and trade unions with respect to self-regulatory initiatives. It reflects some of the cultural and historical differences that affect the worldview of these quite different organizations. For example, political scientist Robert O'Brien asserts that trade unions tend to have more faith in relying on the State for adequate regulation than do NGOs.¹³⁶ However, O'Brien's assertion overlooks the fact that while independent NGOs may maintain a greater critical distance from the State than those trade unions that come from a more corporatist tradition, trade unions have also developed a mode of representation through which they cooperate with management to

Consider, for example, that until most recently, the only NGO regularly to attend the ILO conference and that has developed a working strategy vis-à-vis the ILO was Amnesty International. See Leary, *supra* note 62, at 24. By contrast, the United Nations Economic and Social Council (ECOSOC), which has a more traditional organizational structure, has incorporated a broad range of NGOs into its advisory and consultative bodies. See LUCIE LAMARCHE, PERSPECTIVES OCCIDENTALES DU DROIT INTERNATIONAL DES DROITS ÉCONOMIQUES DE LA PERSONNE 17-18, 222 (1995).

135. See Trebilcock, *supra* note 129, at 11-12 (discussing the impact of economic dislocation after the 1973 "oil shock" on tripartite labor relations institutions).

136. See O'Brien, *Commentary*, *supra* note 7, at 162.

regulate themselves.¹³⁷ They have structures that enable them to seek conflict resolution without direct recourse to the State.

There is also a commonly-held perception that NGOs are less self-interested than trade unions, which are primarily concerned with extracting benefits for their limited range of members, to the detriment of the broader work force.¹³⁸ This perception is nurtured by the fact that many NGOs can at least make the claim that they represent those who suffer violations of certain fundamental human rights. Indeed, because of legislative prohibitions, the individuals they represent are not likely to be considered "workers" eligible to join a union. Child laborers and forced laborers most obviously fall within this category, but other workers, such as domestic workers and home workers (who tend to be women from economically underprivileged backgrounds) regularly face the same dilemma.¹³⁹ Others may tend to be traditionally marginalized workers (notably certain minorities), those who have experienced the greatest difficulty obtaining unionization (notably migrants), or those whose interests have not historically been effectively represented within traditional union structures (notably women workers).¹⁴⁰ In many of these cases, the workers may be represented more effectively by organizing through NGOs around identities other than "worker." By focusing on how globalization affects these most marginalized workers, the representative deficit of mainstream trade unions is brought to the fore.

However, as NGOs proliferate, the differences among them may become greater than their similarities. Consider that in 1997, eight large NGOs controlled nearly half of the U.S. \$8 billion resources represented by the entire

137. According to the World Bank,

[n]ations that, usually for political reasons, limit the freedom of unions to organize and operate are left without a mechanism that allows workers and firms to negotiate wages and working conditions equitably. The result has tended to be excessive intervention and regulation as governments try to pacify workers and gain support for state-controlled unions.

THE WORLD BANK, WORLD DEVELOPMENT REPORT 1995: WORKERS IN AN INTEGRATING WORLD 79-80 (1995).

138. See, e.g., *id* at 80 (arguing that "unions can also have a negative economic effect. In some countries they behave as monopolists, protecting a minority group of relatively well-off unionized workers at the expense of the unemployed and those in rural and informal markets, whose formal sector employment opportunities are correspondingly reduced").

139. See generally WOMEN IN TRADE UNIONS: ORGANIZING THE UNORGANIZED (Margaret Hosmer Martens & Swasti Mitter eds., 1994); see also Adelle Blackett, *Making domestic work visible: the case for specific regulation* (ILO Working Paper, 1998), available at <http://www.ilo.org/public/english/dialogue/govlab/papers/1998/domestic/index.htm>.

140. See Marion Crain, *Between Feminism and Unionism: Working Class Women, Sex Equality, and Labor Speech*, 82 GEO. L.J. 1903 (1994).

NGO market.¹⁴¹ Yet little distinction is made between the widely differing types of associations. Moreover, the term “non-governmental organization” fails to capture the distinction between broad-based membership organizations and those representing only a few persons.¹⁴² The channels of accountability for NGOs are sometimes non-existent. As I suggest in this Article, relations between local civil society groups and transnational NGOs may themselves be problematic. Indeed, some NGOs need to safeguard close relationships with international donor agencies; this concern might affect their local delivery.¹⁴³ The gulf between NGOs in the North and those in the South is further widened by inequities of power, limited access to technology and resources, the prevalence of the English language, and divergent interests.¹⁴⁴ Some attention to the implications of these disparities is therefore warranted. Yet, the labor rights advocacy surrounding codes of corporate conduct emphasizes NGO representation without focusing on the representative character of the groups that are engaged in advocacy.

Despite this important oversight, the claims of representative character still rest quite firmly on the broadly-defined distribution of interests represented by the categories of workers, employers, and governments. Arguably, corporate self-regulatory initiatives highlight the extent to which other concerned groups, such as human rights advocates and consumer lobbies, have a stake in the globalization of labor relations. Tripartism broadly understood,¹⁴⁵ which might also be referred to as “tripartism plus,” would enable representation to shift and broaden according to the issues and interests concerned; it might therefore be more responsive to the new international division of labor and to changing regulatory needs. Tripartism plus would be based on a fluid notion of identity,¹⁴⁶ recognizing that the term “worker” is at once a partial representation and a composite of different actors. It would provide a way for participatory rights to be claimed for a broader spectrum of affected actors, locally, nationally, transnationally and internationally.

141. See Krut, *supra* note 20, at 8.

142. See *id.*

143. See DE SOUSA SANTOS, *supra* note 73, at 268.

144. See Krut, *supra* note 20, at 14, 50.

145. For an early discussion of this broadened notion, see Trebilcock, *supra* note 129, at 9, 29, 35, and 44.

146. See generally Marion Crain & Ken Matheny, *Labor's Divided Ranks: Privilege and the United Front Ideology*, 84 CORNELL L. REV. 1542 (1999) (underscoring the challenges to the notion of labor solidarity presented by gender and race diverse workforces); Molly S. McUsic & Michael Selmi, *Postmodern Unions: Identity Politics in the Workplace*, 82 IOWA L. REV. 1339 (1997) (thinking through the ways that attention to identity may complement the status of worker).

Tripartism plus would rest on a deep understanding of notions of identity and difference, recognizing as crucial to any participatory initiatives actors beyond the traditional tripartite actors. In this regard, I agree with Harvey, who asserts that a dynamic approach to dealing with the new paradigm in labor regulation¹⁴⁷ would demand theorization of omnipresent yet historically and geographically contingent aspects of social organization, such as race and gender.¹⁴⁸ The organizing notion of “citizenship” in its varied manifestations, for persons and for corporations,¹⁴⁹ and across levels of governance, also needs to be fundamentally rethought.¹⁵⁰

While there is a tendency to focus on the breadth of the term “worker,” there is also room to broaden the understanding of the other two tripartite actors—governments and employers. Indeed, national governments, as representatives of “the State,” invariably fail to reflect the full social diversity of their citizens; in some cases, their broader legitimacy, hence their ability to govern as the sovereign in international law, is itself in question.¹⁵¹ Tripartism plus provides a way to grapple with the MNEs and other economic organizations, such as the international chambers of commerce, and include them in debates that concern them, without lumping them into the same representational pool as NGOs that advocate on behalf of workers.¹⁵² The notion can provide room to distinguish between small, local subcontractors and MNEs, between powerful foreign affairs and trade ministries and

147. See Arthurs, *supra* note 69, at 3 and accompanying text.

148. See HARVEY, *supra* note 13, at 355. See also HELD, *MODELS OF DEMOCRACY*, *supra* note 159, at 264-65, 273. Held recognizes that

distinctive national, ethnic, cultural and social identities are part of the very basis of people's sense of being-in-the-world; they provide deeply rooted comfort and distinctive social locations for communities seeking a place 'at home' on this earth. But these identities are always only one possible identity, among others. They are historically and geographically contingent.

Held, *New International Order*, *supra* note 122, at 116. Attention to diversity would also entail paying attention to the cultural specificity of communication, that is “to the way that power sometimes enters speech itself” and the need to “[propose] a more inclusive model of communication.” See Young, *Communication and the Other*, *supra* note 118, at 63.

149. See SASSEN, *LOSING CONTROL*, *supra* note 109; see also Daniel M. Downes & Richard Janda, *Virtual Citizenship*, 13 CAN. J. L. & SOC. 27 (1998).

150. See Kim Rubenstein & Daniel Adler, *International Citizenship: The Future of Nationality in a Globalized World*, 7 IND. J. GLOBAL LEGAL STUD. 519 (2000) (identifying the consequences for “nationality” in a world where sovereignty is challenged by the process of globalization).

151. See Thomas M. Franck, *Fairness to Persons: The Democratic Entitlement in Fairness*, in FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 83 (1995) (tracing the foundations and scope of this democratic right in international law).

152. See Krut, *supra* note 20, at 20 (exploring some of the difficulties caused by the fact that under UN NGO recognition criteria, the distinction between MNEs and public interest NGOs is not clearly established).

relatively under-resourced labor ministries.

Despite this flexibility, participatory democracy invariably will imply that some concerned groups will not have access to transnational decision-making all the time.¹⁵³ However, adopting a more fluid notion of which groups should have access to dialogue on which issues at which times would seem to meet this concern. In other words, rather than entrenching rights of access to a broader range of groups, tripartism plus would instead seek to ensure that participation varies and is regularly re-thought. Once a principled starting point for participation has been established, attention can be turned to developing mechanisms to ensure that participatory access is also funded.¹⁵⁴

C. A Concrete Application: Thoughts for the Developing Framework of the United Nations Global Compact

Rethinking codes of corporate conduct in the light of the notion of tripartism plus can have immediate applications. In this section, I examine one recent initiative at the international level, the UN's Global Compact, discussing how its attention to labor rights might be reconceived to reflect the specificity of labor regulation and to promote more cosmopolitan democratic governance. By turning to the international, I do not wish to convey that the international should necessarily be the locus of all solutions designed to escape, or extend beyond, the national. Nor do I mean to obscure the importance of place to labor regulation, or the role of individual state and other actors in creating particular places. Rather, I turn to the international to consider a framework that crafts a complementary role for the participation of multiple actors, while retaining its effectiveness across governance levels.¹⁵⁵

153. See *id.* at 16 (noting that while certain models of participatory democracy might in theory allow more people to "fill up the 'back of the room' in international decision-making, it may not allow new and weaker NGOs entry at all. Nevertheless, direct and participatory democracy remains a strong model for smaller, developing country NGOs").

154. Mechanisms for funding participation are also worked into the ILO's notion of tripartism. Government delegations that fund their own participation are also required to ensure that there are tripartite delegations; this can entail paying for them to participate. Depending on the activity, the Organization itself contributes toward the travel expenses of delegates. This overcomes the assumption in some other for a that civil society representatives should pay their own way, or not attend. Although these features have not erased inequities in the relative size of delegations that arrive individual member States, they nonetheless enable participatory rights to have some meaning.

155. This analysis is meant to affirm Iris Marion Young's assertion in the context of democratic theory and international justice that "[w]orking through social and political relations that affirm a positive sense of group difference and give specific representation to oppressed groups may be the most important political agenda in the world today." See Iris Marion Young, *International Justice*, in *JUSTICE AND THE POLITICS OF DIFFERENCE*, *supra* note 117, at 257, 259.

At the rather exclusive World Economic Forum in Davos, held on January 31, 1999, world economic and political elites, momentarily humbled by the scathing critiques of the management of the Asian financial crisis, acknowledged the importance of stable institutions to accompany economic growth. UN Secretary-General Kofi Annan challenged these participants to embrace a new Global Compact, calling upon businesses to support and respect nine principles covering a range of human rights, labor standards, and environmental principles.¹⁵⁶ At a "high level" meeting in July 2000, the Secretary General convened a number of large corporations, business associations, major representatives of labor, and several major civil society organizations.¹⁵⁷ At that meeting, approximately fifty MNEs took a public stand on the Global Compact and its principles, pledging to translate the principles into corporate practice.¹⁵⁸ The labor standards articulate the fundamental principles and rights at work contained in the ILO's 1998 Declaration.¹⁵⁹ Explanatory documents list ILO core labor standards and other UN instruments as reference sources, and set out reasons why adhering to labor standards is in the corporations' best interests.¹⁶⁰

Despite the Global Compact's resemblance to many coordinated initiatives surrounding codes of corporate conduct, its organizers resist characterizing it in this manner.¹⁶¹ Instead, the Global Compact is meant to "[highlight] the

156. See United Nations Global Compact Network, *The Nine Principles: A Compact for the New Century* (Jan. 31, 1999), available at <http://www.unglobalcompact.org/gc/UNWeb.nsf/content/thenine.htm> (last visited June 16, 2001) [hereinafter *The Global Compact*].

157. See United Nations Global Compact Network, *Executive Summary and Conclusion – High-Level Meeting on the Global Compact*, July 26, 2000, at <http://www.un.org/partners/business/gcevent/press/summary.htm> (last visited June 16, 2001) [hereinafter *Global Compact Meeting*].

158. *Id.* The specific requirements of the pledge are as follows:

1. Advocating the Compact in their mission statements, annual reports and similar venues;
2. At least once a year, posting on the Global Compact website specific examples of progress they have made, or lessons they have learned, in putting the principles into practice;
3. Joining with the United Nations in partnership projects, either at the policy level—for instance, a dialogue on the role of corporations in zones of conflict—or at the operational level in developing countries, such as helping villagers link up to the Internet, or strengthening small and medium-sized firms.

Id.

159. See discussion at *supra* notes 28-33 and accompanying text.

160. See *The Global Compact*, *supra* note 156 (*Principles 3, 4, 5, 6*) at <http://www.unglobalcompact.org/gc/UNWeb.nsf/content/prin3456.htm> (last visited Apr. 16, 2001).

161. See *Global Compact Meeting, (Issues relating to the Global Compact)*, at <http://www.un.org/partners/business/gcevent/press/whatis.htm> ("The Global Compact is not a code of conduct; monitoring and verification of corporate practices do not fall within the mandate or the institutional capability of the United

global citizenship qualities of corporations and [open] up opportunities for focused, mediated, directed and constructive dialogue.”¹⁶² And although the expression “global citizenship qualities of corporations” is laden with presumably unintended implications,¹⁶³ its use in this context appears primarily propagandistic. The more interesting dimension of the initiative, for the discussion of cosmopolitan democracy, remains its recognition that corporate self-regulatory initiatives open up opportunities for discussion.

Bringing the business community into UN sponsored dialogue has significant implications and invariably weighty consequences. From the start, the Global Compact has been met with biting criticism, and with the call for the United Nations to rethink the entire strategy in order to avoid “participating in a ‘bluewash’ [by] allowing some of the largest and richest corporations to wrap themselves in the United Nations’ blue flag without requiring them to do anything new.”¹⁶⁴ There is particular concern that some of the companies selected to join the Global Compact are inappropriate partners for the United Nations, given their human rights record.¹⁶⁵ Moreover, some high-profile NGO participants, like Pierre Sané, the Secretary General of Amnesty International, have called for independent monitoring within the Global Compact structure.¹⁶⁶

There is doubtlessly a fair degree of opportunism and realism associated with the Global Compact. I agree with many of the critiques proffered by groups that advocate instead a “Citizens’ Compact,” particularly that legal frameworks are important, and that governments and civil society should be assisted to ensure compliance. While accepting those critiques, I argue nonetheless that an initiative like the Global Compact holds the potential to generate structured cosmopolitan dialogue, in three ways. First, the initiative

Nations. But neither is the Compact to be used as a corporate shield from criticism.”) (last visited Apr. 16, 2001).

162. *Id.*

163. See SASSEN, *LOSING CONTROL*, *supra* note 109 (who juxtaposes the dramatic rise in economic “citizenship” rights that MNEs have amassed with the decline in citizenship rights of natural persons). The term “responsible citizenship” is also used in Secretary-General of the United Nations, *Guidelines—Cooperation between the United Nations and the Business Community*, ¶ 12(a) (June 17, 2000), available at <http://www.un.org/partners/business/guide.htm> (last visited June 16, 2001).

164. See Joseph Kahn, *Multinationals Sign U.N. Pact on Rights and Environment*, N.Y. TIMES, July 27, 2000 at A3. See also Press Release, Global Compact—Groups Call for Suspension in Porto Alegre, Jan. 28, 2001, available at <http://www.corpwatch.org/globalization/un/papr.html> (last visited May 8, 2001).

165. See Letter Says Global Compact Threatens UN Integrity, Letter to Secretary General Kofi Annan from a wide range of civil society organizations, dated July 25, 2000, available at <http://www.corporatewatch.org/globalization/un/gctr2.html> (last visited May 8, 2001).

166. *Id.*

holds the potential to ensure that the premier intergovernmental organization, the United Nations, plays a participatory role in the development and shaping of corporate governance. In an assessment of the aims and potential of the Global Compact, two high-ranking UN officials argue that the Global Compact “tries to enlist the business community in an advocacy role on behalf of the UN.”¹⁶⁷ For the authors of the Global Compact, a United Nations that is able to address labor, environmental, and human rights concerns in an effective manner would fill a crucial global governance gap.¹⁶⁸ Through the Global Compact, the United Nations may do so while reinforcing the centrality of internationally agreed upon standards. In the labor domain, the Global Compact draws upon the ILO’s fundamental principles and rights at work. Additionally, it provides the space to collaborate constructively with the ILO without being weighed down by the ILO’s often burdensome structural constraints.

Second, the Global Compact holds the potential to escape narrowly corporatist notions of representation. It is able to engage major representatives of labor¹⁶⁹ and business, who—so long as they are not complicit with human rights abuses—should be present in these discussions. In this regard, it has the potential to build a broad, tripartite plus framework. As an international organization that has consistently increased the participation of civil society in its activities, the United Nations has the legitimacy and the infrastructural capacity to convene these groups on a broad range of concerns. But, the United Nations needs to ensure that its deference of human rights remains uncompromised, by ensuring that its role is merely to help corporations that are prepared to engage in constructive action on labor rights, rather than simply gaining financially from their public-relations oriented largesse.

Third, the Global Compact has real potential to refocus attention on the issues faced by developing countries that prevent them from securing

167. See Georg Kell & John Gerard Ruggie, *Global Markets and Social Legitimacy: The Case of the ‘Global Compact,’* Paper presented at an international conference, *Governing the Public Domain Beyond the Era of the Washington Consensus? Redrawing the Line Between the State and the Market*, York University, Toronto, Canada, Nov. 4-6, 1999 ¶ 12, available at <http://www.unglobalcompact.org/gc/unweb.nsf/content/gkjr.htm>.

168. The authors also contend that if the UN were to be effective, it could also displace much of the pressure on the world trading system to address these concerns. *Id.* The first paper in this trilogy would, however, challenge that perspective. See generally Blackett, *supra* note 19.

169. This should logically include the International Trade Secretariats, in some cases at the forefront of negotiating industry-level “framework agreements” to establish ongoing relationships with MNEs. See Dwight W. Justice, *The New Codes of Conduct and Social Partners*, available at <http://www.icftu.org/displaydocument.asp?Index=991209382> (last visited June 1, 2001).

fundamental principles and rights at work for the workers in their territory. There are signs that this attention shift is already happening within the Global Compact framework. At the July 2000 meeting discussed above, the participants noted the importance of effective governance in promoting decent work, and acknowledged the need for industrialized countries to play a role in eradicating extreme poverty by opening their markets to developing countries' exports, moving swiftly on debt relief, and increasing the volume and effectiveness of official development assistance.¹⁷⁰ Yet, despite these statements, the authors of the Global Compact seem able to resist (invariably futile) totalizing impulses to eclipse existing self-regulatory initiatives, however flawed. In other words, the Global Compact wisely does not try to create an all-encompassing "code;" rather, it seeks only to coexist with existing and future initiatives.

To harness the Global Compact's potential to highlight deeper structural labor relations concerns, however, its implementors must take into account three central correctives. First, the role of government in this approach must be clarified and brought to the fore. Indeed, it might seem anachronistic that any initiative taken by the United Nations should reflect such a conspicuous absence of national governments. The Executive Summary of the meeting discussed above lists a range of roles that the various business and civil society groups can play, but contains only the standard statement that "[v]oluntary initiatives of [this] kind ... are no substitute for action by governments."¹⁷¹ To some extent, the involvement of the United Nations and its relevant specialized agencies is enough to fill this void. Within their own constituencies, the intergovernmental organizations have the ability and resources to ensure that their memberships' concerns are well understood and represented. Nevertheless, the respective organizations must consider how to ensure that they are indeed speaking internationally to the representatives of government that the MNEs encounter when they act transnationally (notably ministers of foreign affairs and trade), as well as to the representatives of governments that tend to be marginalized from these encounters (notably ministers of labor). There may be moments when these representatives should be directly present at meetings. On many other occasions, regular UN structures and those of the

170. See *Global Compact Meeting*, *supra* note 157, (*Executive Summary and Conclusion: Companies*), at http://www.un.org/partners/business/gcevent/participants_C.htm (last visited Apr. 15, 2001).

171. *Id.* at ¶ 6. See also Kahn, *supra* note 164 (quoting the Secretary-General of the UN, Kofi Annan, who stated at a press conference that "Companies should not wait for governments to pass laws before they pay a decent wage or agree not to pollute the environment. . . . If companies lead by example, the governments may wake up and make laws to formalize these practices.").

UN's specialized agencies should provide sufficient channels for expression.

Second, the Global Compact must retain the ability to craft flexible, fluctuating representation. The list of participants in publicly announced events thus far shows a bias in favor of large, institutionalized, Western NGOs and corporations. Despite terms in the guidelines that suggest that corporations that are complicit in human rights abuses will not be eligible for partnership, it is not apparent that any triage has been undertaken, and the absence of a monitoring mechanism calls into question how this determination can ultimately be made by the United Nations. Moreover, although one of the stated (but apparently not yet realized) goals of the Global Compact is to enlist a wide range of small corporations, there has been no such statement concerning representatives of workers. But the exclusive focus on corporate initiatives as they relate to the fundamental principles and rights at work calls out for participation—in the specific places where MNE production occurs—by those who can represent child workers, forced laborers, and workers who face discrimination on grounds such as race, gender and level of ability. While this comment does not necessarily challenge the occasional “high level” meeting to discuss the initiative at a macro level, it does imply that the legitimacy of the participatory forum is dependent on its ability creatively to bring those most concerned into its fold. Doing so will require sensitivity to the inevitable skepticism of some smaller NGOs of yet another seemingly “top-down” initiative. Harnessing business input might entail harnessing direct business funding to facilitate the participation of a constantly fluctuating group of local and transnational actors. Obtaining corporate funding would have to be done with the greatest care to ensure that the financial input does not lead to a muting of criticism of the donor's corporate activities. The United Nations, drawing on its many decentralized agencies and its wide ability to distribute information and ensure that it is available online, should be well placed to begin the consultative process of establishing criteria and identifying the civil society organizations that might be most apt to contribute.

Third and finally, the initiative must grapple with the specificity of labor regulation. While there is a clear logic to dealing with a range of social responsibility considerations together, as discussed earlier, labor is simply different because of the relational dimensions of the workplace and the risk of enlarging the scope of management power in a relationship of subordination. To rethink the Global Compact might therefore entail being more methodical about the way that the ILO's fundamental principles and rights at work are

approached. Systematic attention to place is essential. The loose alliance with the ILO should provide the resources to draw upon the expertise of industrial relations specialists who have a broad enough vision to stray creatively from traditional fordist regulatory approaches to consider creative approaches that reflect the regulatory goals and pluralist nature of labor law in the new labor market.

These correctives ultimately call for the development of a thickened theoretical basis for the Global Compact—a basis that will support the implementation of a more tailored set of conditions of participation on a cosmopolitan governance model. These correctives also place considerable faith in the ability of a carefully constructed participatory structure to develop and to respond creatively to pressing labor regulatory concerns, once those most concerned are at the table. A great virtue of the Global Compact is precisely its willingness to accept the creation of space as a starting point.

CONCLUSION

I have argued in this Article that the flurry of current codes of corporate conduct developed by MNEs, as well as the advocacy movements surrounding them, warrant sustained theoretical analysis. Globalization, legal pluralism and the decentered state have provided suitable lenses for the analysis. I have suggested that the tendency of these codes to overlook the pluralistic foundations of labor regulation, and their extension of unilateral management power over particular places, is problematic. In addition, their challenge to dominant conceptions of globalization is limited, as they reinforce certain problematic asymmetries and entrench limited state regulatory action. Yet the codes, and the advocacy they have generated, have shown the potential to open up spaces for discussion—spaces that can be used to spotlight regulatory deficits and to promote cosmopolitan democratic participation by representative stakeholders in the labor context. These possibilities exist at many levels, and a starting point at the international may already exist. The United Nation's effort must be informed, however, by a thicker theoretical understanding of what it means to create a fluid site for cosmopolitan democratic participation that accounts for the specificity of labor regulation in particular places. In this Article, I have analyzed these problems and provided hints at how to begin to address them. Ultimately, though, I am content to rest

with the wager that once the representational spaces are themselves opened up, then this theoretical thickening will be attained as the complex particulars of equitably re-regulating transnational workplaces are brought to light.